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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 178.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

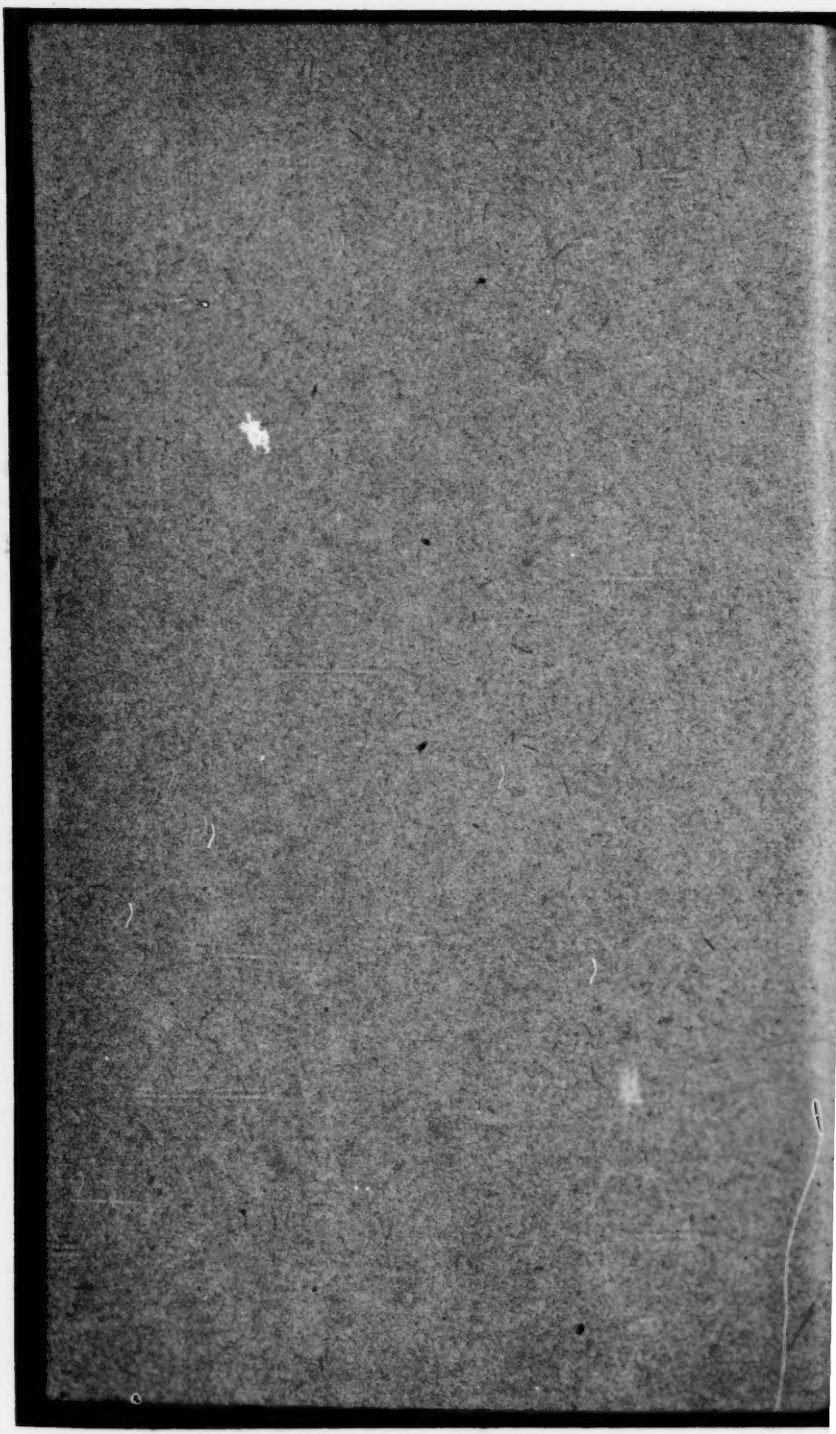
vs.

THE STATE OF NEBRASKA EX REL. THE CITY OF OMAHA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MAY 16, 1902.

(16,300.)



(16,300.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 524.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA EX REL. THE CITY OF OMAHA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 CHICAGO, B. & Q. R. Co. } No. 7805.
v.
STATE *ex Rel.* OMAHA. }

Pleas before the supreme court of the State of Nebraska at a term thereof begun and holden at the capitol, in the city of Lincoln, in said State, on the 7 day of January, 1896.

Present: Hon. A. M. Post, chief justice; Hon. T. O. C. Harrison, Hon. T. L. Norval, judges.

Attest: D. A. CAMPBELL, *Clerk.*

Be it remembered that on the 12 day of June, 1895, there was filed in the office of the clerk of said court a certain petition in words and figures following, to wit:

In the Supreme Court of Nebraska.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Plaintiff in Error,
v.
THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, Defendant in Error. } Petition in Error.

Comes now The Chicago, Burlington & Quincy Railroad Company, plaintiff in error herein, and, complaining of the defendant in error, alleges that on May 1, 1895, in an action pending in the district court of Douglas county, Nebraska, wherein the above-named defendant in error was relator and the plaintiff in error herein was respondent, a judgment was rendered in favor of the relator and against the respondent, ordering and allowing a peremptory writ of mandamus to issue against the respondent, the plaintiff in error herein, commanding it to do and perform
2 certain things therein specified and adjudging the costs of said action against it. A duly certified transcript of said proceedings, including said judgment, together with a duly authenticated bill of the exceptions upon the trial of said cause, is filed herewith.

The plaintiff in error alleges that there is error appearing of record in said proceedings and judgment in said cause as follows:

1. The court erred in rendering its judgment herein for the reason that same is not sustained by sufficient evidence.

2. The court erred in rendering its judgment herein for the reason that same is contrary to law.

3. The court erred in rendering its judgment herein because the relator, defendant in error, had no power or authority to require or compel the respondent, plaintiff in error, to repair the Eleventh-street viaduct.

4. The court erred in holding that relator had any power conferred on it by virtue of chapter twelve of the Compiled Statutes of

Nebraska, 1893, to require respondent to repair the Eleventh-street viaduct or any part thereof.

5. The court erred in holding that the provisions of section 48 of the charter creating cities of the metropolitan class, as amended in 1893, did not impair the obligations arising out of the contract between this respondent and the relator relative to the construction of the Eleventh-street viaduct.

6. The court erred in holding that the relator, under the terms of the contract of 1886 between the relator and this respondent and the laws then subsisting relative thereto and subsequent amendments, was not bound to repair the Eleventh-street viaduct.

7. The court erred in not holding section 48 of an act entitled "An act incorporating metropolitan cities," etc., as amended in 1893, unconstitutional.

3 8. The court erred in failing and refusing to determine and adjudicate the issues made by the pleadings in this case.

9. The court erred in holding that the charter of the predecessor of this respondent and an ordinance, No. 729, of the relator did not constitute a contract between this respondent within the meaning and protection of the constitution of Nebraska and the United States, guaranteeing the inviolability of contracts.

10. The court erred in holding that section 48 of the charter relating to metropolitan cities, as amended in 1893, had any reference to viaducts theretofore constructed.

11. The court erred in exercising jurisdiction herein for the reason that there was a defect of parties respondent.

12. The court erred in holding that relator had any authority conferred on it by section 48 of the charter relating to metropolitan cities, and as amended in 1893, to determine upon and select the materials for the repair of the vaiduct in controversy.

13. The court erred in compelling this respondent to arbitrarily repair one-third of the viaduct in controversy, when, as a matter of fact, this respondent only owned and operated a single track out of twenty-one or more tracks which crossed Eleventh street under said viaduct, that requirement being arbitrary, unjust, inequitable, unreasonable, and unconstitutional.

14. The court erred in granting the writ herein for the reason that an obedience to the commands of the same by this respondent would not repair the viaduct in controversy.

15. The court erred in granting the writ herein for the reason that the Union Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Milwaukee &

4 St. Paul Railway Company, which own and operate, either jointly or severally, twenty or more of the tracks which cross said Eleventh street beneath said viaduct, are necessary parties in order to determine the proportion each should bear, including this respondent, in the cost of or the repair of the viaduct in controversy.

16. The court erred in not deciding that the ap-portionment of one-third of cost of repairing viaduct to this respondent was inequitable, unjust, and arbitrary, and, further, in not deciding that the action

of the city council in making such apportionment was subject to review in this proceeding.

17. The court erred in overruling the motion for a new trial herein for the reason that the decision is not sustained by sufficient evidence.

18. The court erred in overruling the motion for a new trial herein because the decision is contrary to law.

19. The court erred in overruling the motion for a new trial herein because the court failed and refused to determine and adjudicate the issues made by the pleadings in this cause, particularly in refusing to decide whether or not the apportionment to this respondent, the plaintiff in error herein, of one-third of the cost of repairing the Eleventh-street viaduct was inequitable, unjust, and arbitrary and in not deciding whether or not the action of the city council in making such apportionment was subject to review in this proceeding.

Wherefore the plaintiff in error prays that the judgment aforesaid be reversed, and that same be remanded, and for such other relief in the premises as to the court shall seem just and proper.

5 CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
By GREEN & BRECKINRIDGE, *Its Attorneys.*

(Endorsed:) 7805. In supreme court, State of Nebraska. The Chicago, Burlington and Quincy Railroad Company, plaintiff in error, *v.* The State of Nebraska *ex rel.* The City of Omaha, relator, defendant in error. Petition in error. Supreme court of Nebraska. Filed Jun- 12, 1895. D. A. Campbell, clerk.

And on the same day, to wit, the 12 day of June, 1895, there was filed in the office of the clerk of said court a certain defendant's appearance in words and figures following, to wit:

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY, Plaintiff in Error, *vs.* THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, Defendant in Error.	Waiver of Summons and Appearance of Defendant in Error.

Now comes the defendant in error, The State of Nebraska *ex rel.* The City of Omaha, and waives the issuance of summons in error herein and enters its appearance herein.

Omaha, June 11th, A. D. 1895.

W. J. CONNELL,
Attorney for Defendant in Error.

(Endorsed:) 7805. In supreme court, State of Nebraska. The Chicago, Burlington and Quincy Railroad Company *v.* The State of Nebraska *ex rel.* The City of Omaha, relator. Waiver of summons and appearance of defendant in error. Supreme court of Nebraska. Filed Jun- 12, 1895. D. A. Campbell, clerk.

6 And on the same day, to wit, the 12 day of June, 1895, there was filed in the office of the clerk of said court a certain motion in words and figures following, to wit:

In Supreme Court, State of Nebraska.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error, *vs.* STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Defendant in Error.	Motion to Advance Hearing of Cause.

And now comes the said defendant in error and represents that said cause involves a question of great public interest and concern affecting the city of Omaha and the inhabitants of said city, and that it is very important and necessary to have an early hearing and determination of said cause.

The said defendant in error therefore moves the court that the hearing of said cause be advanced and that said cause be heard at an early day to be fixed by the court.

THE STATE OF NEBRASKA EX REL. THE CITY OF OMAHA, *Defendant in Error*,
By W. J. CONNELL, *City Attorney*.

(Endorsed:) 7805. In the supreme court, State of Nebraska. Chicago, Burlington & Quincy Railroad Co., plaintiff in error, *vs.* The State of Nebraska *ex rel.* The City of Omaha, defendant in error. Motion to advance hearing of cause. Supreme court of Nebraska. Filed Jun- 12, 1895. D. A. Campbell, clerk.

7 And on the same day, to wit, the 12 day of June, 1895, there was filed in the office of the clerk of said court a certain transcript in words and figures following, to wit:

Doc. forty-eight, No. 349.

Pleas before the Honorable G. W. Ambrose, one of the judges and the presiding judge of the district court of the fourth judicial district of the State of Nebraska, at a term thereof within and for the county of Douglas begun and held at the city of Omaha on the 4th day of February, A. D. 1895.

Be it remembered that heretofore, to wit, on the 19th day of January, A. D. 1895, The State of Nebraska *ex rel.* The City of Omaha, relator, by J. W. Connell, its attorney, filed in the office of the clerk of said court its petition and application for mandamus against The Chicago, Burlington & Quincy Railroad Company, respondents; which said petition and application reads and is in the words and figures following, to wit:

Petition & Application for Mandamus.

In the District Court of Douglas County, State of Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, *vs.* THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.	Petition and Application for Mandamus.

To the honorable the court above named:

Your petitioner, The City of Omaha, respectfully represents and shows to your honors that the city of Omaha, in the county of Douglas and State of Nebraska, is a city of the metropolitan class duly existing under and governed by the provisions of chapter 12*a*—cities of the metropolitan class—of the Compiled Statutes of Nebraska of 1893, purporting to be published under the au-
8 thority of the legislature by Guy A. Brown and Hiland H. Wheeler, and is possessed of all the rights, powers, and privileges provided for or authorized by the several provisions of said chapter of said statutes.

Your petitioner further represents and shows unto your honors that — all the times and dates herein mentioned or referred to the said Chicago, Burlington & Quincy Railroad Company was and now is a corporation duly created and existing under and by virtue of the laws of the State of Illinois and has complied with the laws of the State of Nebraska so as to be authorized to transact and do business as a railroad company in the State of Nebraska and has a general office for said State of Nebraska in said State and is the grantee and successor to the Missouri River Railroad in Nebraska and the Omaha & Southwestern Railroad Company, which said last-named companies are corporations duly created under the laws of the State of Nebraska.

Your petitioner further represents and shows unto your honors that said Chicago, Burlington & Quincy Railroad Company, as such grantee and successor of said Missouri River Railroad in Nebraska and said Omaha & Southwestern Railroad Company, at all the times and dates herein mentioned or referred to was and is the owner of and was and is engaged in operating a number of railroad lines in said State of Nebraska with railroad tracks starting from its railroad passenger and freight station in the city of Omaha, east of Tenth street, in said city, and extending westward through said city over and across Eleventh street, in said city, which said Eleventh street your petitioner represents and alleges to be a public street in the city of Omaha and a much-travelled thoroughfare, which for many years past has existed from Chicago street, in the northerly portion of the city, southward for a distance of about thirty blocks to a certain street known as Bancroft street.

9 Your petitioner further represents and shows unto your honors that there now is and at the time of the proceedings

hereinafter referred to there was a certain iron viaduct with plank flooring along said Eleventh street, extending from Jackson street to Mason street, a distance of four blocks, in said city, and extending over and across all of the tracks of said railroad corporations hereinbefore named, all of which are daily and constantly used and operated by said Chicago, Burlington & Quincy Railroad Company.

Your petitioner further represents and shows unto your honors that by reason of said railroad tracks of said Chicago, Burlington & Quincy Railroad Company crossing said Eleventh street, which was a generally traveled and much frequented street by teams and pedestrians, which tracks so cross said Eleventh street at a grade or ground crossing under the southern portion or part of said viaduct as constructed, and by reason of certain railroad tracks of the Union Pacific Railway Company of like character over and along that portion of said Eleventh street now under the northerly portion of said viaduct, the said Eleventh street was rendered dangerous for travel by teams and pedestrians, and it became necessary for the safety and protection of the public to construct said viaduct, and it was therefore declared necessary for the safety and protection of the public, by ordinance duly passed by the mayor and council of said city, to construct said viaduct, and the said viaduct, after the passage of said ordinance and other proceedings duly had and taken in that behalf, was constructed by said Chicago, Burlington & Quincy Railroad Company and the said Union Pacific Railway Company, and was completed by said companies about the year 1886 or 1887.

10 Your petitioner further represents and shows unto your honors that subsequently, about the year 1892, the said viaduct became out of repair and dangerous to public travel, and by reason thereof, on or about the 21st day of July, 1892, a concurrent resolution was duly passed by the city council and approved by the mayor of said city, requiring the committee on viaducts and railways of said council and the city engineer of said city to examine the roadway and road-bed of said Eleventh-street viaduct and report to the city council if it was necessary to repave said viaduct, a copy of which said resolution is hereto attached, marked "Exhibit A;" that in pursuance of said resolution, on the 23rd day of August, 1892, the said committee on viaducts and railways reported to the said city council that said viaduct, as your petitioner alleges the fact to be, was in a dangerous and shameful condition; that there was scarcely a yard of pavement thereon that was not full of holes, and, in fact, nearly the entire pavement had rotted away, and that the walk for foot passengers was dangerous, and that said viaduct was otherwise out of repair, a copy of which said report is hereto attached and referred to as a part of this petition and is marked "Exhibit B."

Your petitioner further represents and shows unto your honors that the city engineer of said city also reported that said viaduct was dangerous and should be repaired, which report was referred to said committee on viaducts and railways, and said committee

subsequently, to wit, September 2, 1892, reported thereon, as shown by a copy of the report of said committee dated September 2, 1892, hereto attached and referred to as a part of this petition and is marked "Exhibit C."

11 Your petitioner further represents and shows unto your honors that in consequence of the dangerous condition of said viaduct for public travel and the need of making repairs to said viaduct it was closed to public travel, and that no teams or pedestrians for about two years last past have been allowed to cross over said viaduct, to the great injury, annoyance, and detriment of the public.

Your petitioner further represents and shows unto your honors that on or about December 4, 1893, ordinance No. 3734 was duly passed by the city council of said city of Omaha and duly approved December 12, 1893, by the mayor of said city, declaring the necessity of repairing said Eleventh-street viaduct and directing the board of public works to prepare plans and specifications for the repairing of said viaduct, a copy of which said ordinance is hereto attached and referred to as a part of this petition and is marked "Exhibit D."

Your petitioner further represents and shows unto your honors that thereafter, in pursuance of the provisions of said ordinance No. 3734, the said board of public works and the city engineer duly submitted plans and specifications for the repair of said Eleventh-street viaduct to the mayor and city council of said city, a copy of which said plans and specifications are hereto attached, marked "Exhibit E," and referred to as a part of this petition, and which said plans and specifications were duly approved by the mayor and city council by the provisions of ordinance No. 3752, duly passed by said city council January 30, 1894, and duly approved by the mayor of said city February 2, 1894, a copy of which said ordinance No. 3752 is hereto attached and referred to as a part of this petition and is marked "Exhibit F."

12 Your petitioner further represents and shows unto your honors that under and in pursuance of the provisions of said ordinance the city clerk of said city, in said month of February, 1894, after the approval of said ordinance last mentioned, furnished to said Chicago, Burlington & Quincy Railroad Company, and also to the said Union Pacific Railway Company, copies of said plans and specifications and duly certified copies of said ordinances and of the proceedings had and taken with reference to the repairing of said viaduct.

Your petitioner further represents and shows unto your honors that in the months of February and March, 1894, and frequently thereafter, by its proper officers, duly authorized in that behalf, your petitioner has made frequent demand on said Chicago, Burlington & Quincy Railroad Company to make repairs to said viaduct as required by said ordinances and as shown by said plans and specifications, but that said Chicago, Burlington & Quincy Railroad Company, by its officers, including its general manager for the State of Nebraska, George W. Holdrege, has absolutely and un-

qualifiedly refused to make said repairs or to take any action whatever with reference to making said repairs, and has wholly failed and neglected in any manner to make said repairs or to take any action whatever with reference to making the same, and does still fail, neglect, and refuse to make the same.

Wherefore your petitioner prays your honors to order that a writ of mandamus in due form issue from this court, returnable at such time as may be determined by your honors, commanding and requiring the said Chicago, Burlington & Quincy Railroad Company to repair that portion of said Eleventh-street viaduct in the city of Omaha, Douglas county, State of Nebraska, commencing at the south end of said viaduct and extending northward a dis-
13 tance of one-third of the entire length of said viaduct, the said repairs to be made in accordance with the requirements of ordinance No. 3752, duly passed by the city council of said city January 30, 1894, and approved by the mayor of said city February 2, 1894, and in accordance with the plans and specifications prepared and submitted by the city engineer and board of public works of said city approved by the council of said city January 30, 1894, and approved by the mayor of said city February 2, 1894, the said repairs to be commenced and carried forward without unnecessary delay, or on failure so to do to show to this court, on the return day of said writ, why the same has not been done.

THE CITY OF OMAHA,
By W. J. CONNELL, *City Attorney.*

STATE OF NEBRASKA, } ss:
Douglas County, }

George P. Bemis, being first duly sworn, says that he is the mayor and chief executive officer of The City of Omaha, the relator named in the foregoing petition; that he has read said petition and knows the contents thereof, and that each and every allegation therein contained is true. GEORGE P. BEMIS.

Subscribed in my presence and sworn to before me this 18th day of January, A. D. 1895.

[SEAL.] JOHN Q. BURGNER,
Notary Public.

EXHIBIT A.

City of Omaha, council chamber.

Resolved by the city council of the city of Omaha, the mayor concurring:

14 That the com. on viaducts and railways and city engineer examine the roadway and road-bed of the 11th-street viaduct and report to this body if it is necessary to repave said viaduct.

Introduced by Councilman Peter E. Elsasser.

Passed July 21, 1892. E. P. DAVIS,
President of the Council.

Attest: JOHN GROVES, *City Clerk.*

Approved:

GEO. P. BEMIS, *Mayor.*

EXHIBIT B.

City of Omaha, council chamber.

OMAHA, NEB., *Aug.* 23, 1892.

Mr. President:

Your committee to which was referred a resolution instructing your committee to examine the roadway of the 11th-St. viaduct and report if it be necessary to repave said viaduct have carefully examined the same and beg to report as follows:

The roadway of said viaduct is in a dangerous and shameful condition. There is scarcely a yard of pavement that is not full of holes; in fact nearly the entire pavement is rotted away; but far more dangerous is the walk for foot passengers.

We find the walk to be composed of but one thickness of plank, and these planks are warped and rotted, and if not attended to at once may be the cause of a frightful accident at any time.

We find also that the fence separating the footway from the road is broken down in many places, in some cases pieces of the fence being entirely missing.

In its present condition the Eleventh-street viaduct is a disgrace to the city, and we recommend that steps be at once taken to put it in a safe and passable condition.

15

SOL PRINCE,
GEO. F. MUNRO,
Committee on Viaducts & Railways.

EXHIBIT D.

Ordinance No. 3734.

An ordinance declaring the necessity of repairing the viaduct on and along South Eleventh street over the railroad tracks from a point near Jackson street to a point near Mason street, in the city of Omaha, and directing the board of public works to prepare plans and specifications for the repairing of said viaduct, etc.

Whereas, that the Eleventh-street viaduct extending from a point near Jackson street to a point near Mason street is unsafe and is in a dangerous condition; and

Whereas it is necessary for the safety and protection of the public that said viaduct be repaired, therefore,

Be it ordained by the city council of the city of Omaha:

SECTION 1. That it is necessary and it is hereby deemed and declared necessary for the safety and protection of the public that the Eleventh-street viaduct extending along Eleventh street from a point near Jackson street to a point near Mason street in the city of Omaha be repaired by causing a new and substantial floor to be placed on and across said viaduct.

SECTION 2. For the purpose of determining the material to be

used in the repairing of said viaduct and the manner and construction thereof, the board of public works of the city of Omaha are hereby ordered and directed within one week from the passage of this ordinance to prepare the plans and specifications for said repairs and to submit the same to the mayor and city council for their consideration, action and approval, and the city engineer for the purpose of enabling the said board of public works to submit said
16 plans and specifications as herein required, is hereby ordered under the direction of the board of public works to render such service to said board in preparing plans, drawings, details and specifications for the repairing of said viaduct as may be necessary for said purpose and as may be required by said board of public works.

SECTION 3. That this ordinance take effect and be in force from and after its passage.

Passed December 4th, 1893.

JOHN GROVES, *City Clerk.*
WM. F. BECHEL,
President City Council.

Approved Dec. 12th, 1893.

GEO. P. BEMIS, *Mayor.*

For Exhibit E see plat immediately following:

(Here follows diagram marked p. 17.)

18 EXHIBIT F.

Ordinance No. 3752.

An ordinance approving the plans and specifications submitted by the board of public works for the repairing of the Eleventh-street viaduct over the railroad tracks and ordering the repairing of said viaduct to be done.

Whereas, it has been and hereby is deemed and declared necessary for the safety and protection of the public that the Eleventh-street viaduct be repaired as herein required; and

Whereas, it is right, proper and reasonable that the railroad companies owning or operating railway tracks across said Eleventh street should make said repairs to said viaduct; therefore

Be it ordained by the city council of the city of Omaha:

SECTION 1. That the plans and specifications submitted by the board of public works of the city of Omaha, December 15, 1893, for the repairs of the Eleventh-street viaduct over the railroad tracks upon and across Eleventh street from a point near Jackson street to a point near Mason street in the city of Omaha, as prepared by the city engineer of said city, be and the same are hereby approved and adopted.

SEC. 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said

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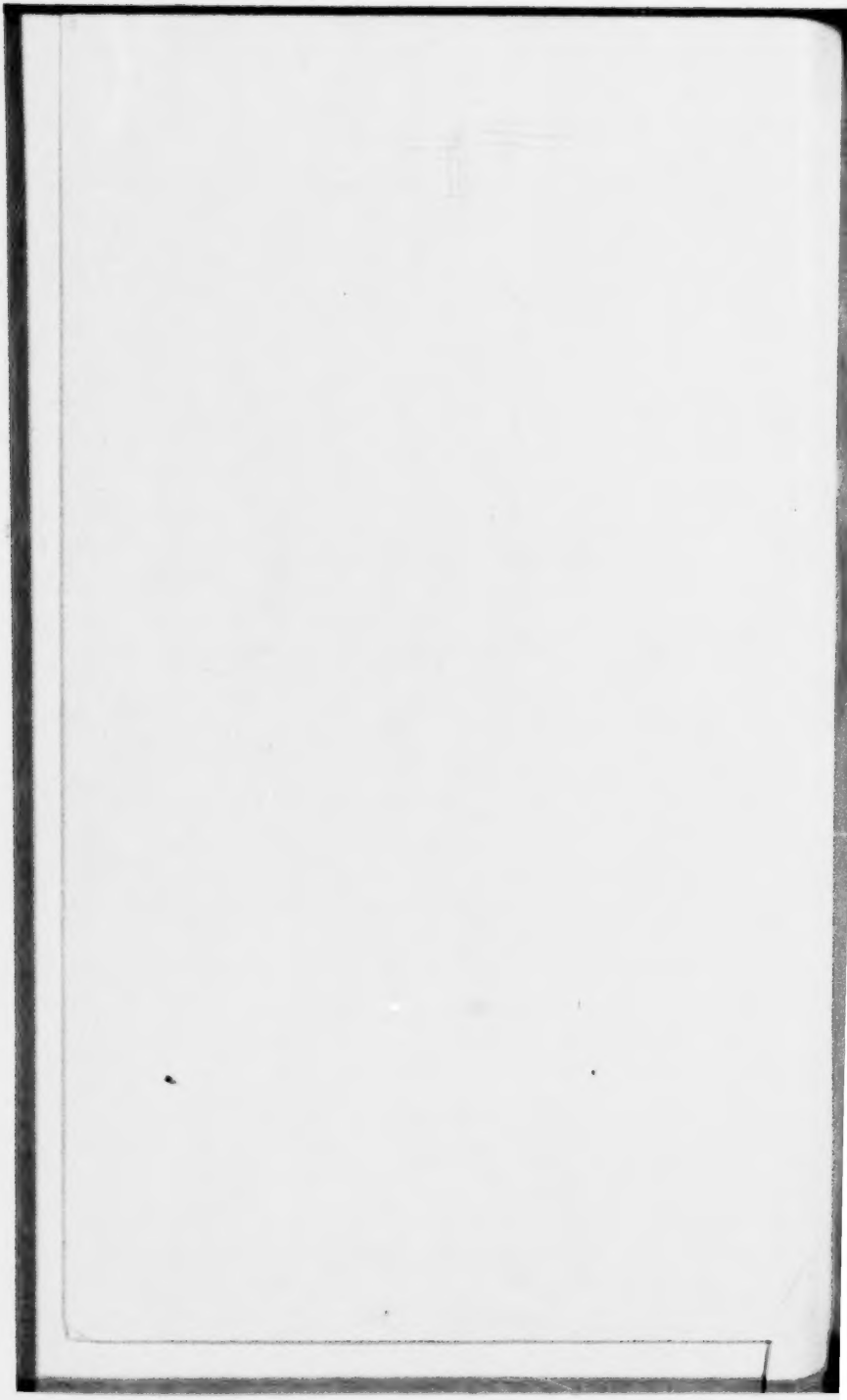

Eleventh-street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct; and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh-street viaduct commencing at the south end thereof, and extending northward a distance of one-third of the entire length of
19 said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance.

SEC. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington & Quincy Railroad Company owning or operating railroad tracks upon and across said Eleventh street under said Eleventh-street viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs.

SEC. 4. That this ordinance shall take effect and be in force from and after its passage.

Passed Jan. 30, 1894.

W. C. WAKELEY, *City Clerk.*
EDW. E. HOWELL,
President City Council.

Approved Feb. 2nd, 1894.

GEO. P. BEMIS, *Mayor.*

Afterwards, on the 19th day of January, 1895, an alternative writ of mandamus was issued herein as follows, to wit:

Alternative Writ of Mandamus.

THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, *vs.* THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.	Alternative Writ of Mandamus.

20 The State of Nebraska to The Chicago, Burlington & Quincy Railroad Company, respondent above named, Greeting:

Whereas on the 19th day of January, 1895, there was filed with the clerk of the district court in and for Douglas county, Nebraska, a petition, duly verified by affidavit, praying for the issuance of a mandamus commanding and requiring you to repair the Eleventh-street viaduct, in the city of Omaha, as hereinafter ordered and required:

passed by the mayor and council of the city declaring the necessity for such viaduct, and that other proceedings were duly had by the mayor and city council in that behalf; but it denies that the viaduct was constructed by the Chicago, Burlington & Quincy Railroad Company and the said Union Pacific Railway Company or by either of them, but, on the contrary, alleges the fact to be that the city of Omaha constructed and completed the same and opened it for travel some time during the year of 1886.

Sixth. As to the several allegations contained in the several paragraghs of the relator's petition, including and following the sixth (6) paragraph thereof, this respondent has no knowledge or information concerning the matters and things therein stated, except as it is advised by the same, and therefore denies each and every thereof and asks that the relator make proof.

24 Seventh. This respondent, further answering, denies each and every allegation contained in the relator's petition, except such as are herein expressly admitted to be true.

Eighth. For further answer herein this respondent alleges that at and many years prior to the time when the proceedings were instituted and measures adopted upon behalf of the city to construct the viaduct aforesaid the city of Omaha was a municipal corporation of the first class created and existing under and by virtue of the laws of the State of Nebraska providing for the incorporation of cities of the first class, and by virtue of the act of the legislature aforesaid, entitled "An act to provide for viaducts, bridges, and tunnels in certain cases in cities of the first class" (approved March 4th, 1885), being chapter twelve (12) of the Laws of Nebraska, 1885, and contained in sections 110 to 115, inclusive, chapter thirteen (13) of the Compiled Statutes of the State of Nebraska of 1885, was vested with the power and authority, under certain circumstances and conditions therein provided for, to engage in the construction and maintenance of viaducts or bridges over railroad tracks occupying or crossing any of the streets, alleys, or highways within its corporate limits, and was also authorized by the provisions of said act to enter into agreements or contracts with any railway company or companies occupying any of the streets, alleys, or highways aforesaid for the purpose of securing from them the necessary payment or contribution of a certain portion of the moneys for the construction of such viaducts and the payment of damages arising therefrom.

25 Ninth. This respondent further alleges that at and for many years prior to the time when the proceedings were instituted to construct the viaduct on 11th street the city of Omaha was and had been divided by the grades and tracks of certain railway companies, so that the use of the several streets in said city intersecting or crossing said grades and tracks was inconvenient and at certain places, to wit, on 10th street, dangerous; that during these years intercourse between the portion of the city south and the portion of the city north of such grades and tracks was largely maintained by means of 7th, 10th, 13th. and 17th streets of said city; that for the purpose of providing greater facilities for the use

of the public between said portion- of the city the relator, duly authorized and empowered in that behalf, on the 1st day of February, 1886, entered into a written contract with the Union Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company, under the name and style of the Omaha & Southwestern Railroad Company, whereby it was agreed between them that the said railway companies, each for itself, would, at its own expense, open 7th, 13th, and 20th streets, in said city, through their respective rights of way, of certain widths, and also build retaining walls and make certain other suitable provisions for the convenient and safe use of said streets by the public, and would also each contribute certain proportions of three-fifths (3/5ths) of the entire cost and damages involved in the construction of certain viaducts upon 11th and 16th streets, such entire costs and damages for the 11th-street viaduct not to exceed the sum of ninety thousand ($90,000.00) dollars and of the 16th-street viaduct not to exceed the sum of thirty thousand ($30,000.00) dollars, and would also open 14th street through their respective rights of way at such time and of such character as future public necessity might require, and in consid-
26 eration of which the said city of Omaha agreed upon its part to construct and maintain the said viaducts and to pay two-fifths (2/5ths) of the entire cost and damages thereby incurred and to close 6th, 12th, and 15th streets, in said city, and to allow 14th, 18th, and 19th streets to remain in their then condition; a copy of this contract is hereto attached, marked "Exhibit A," and made a part hereof.

Tenth. The respondent further alleges that at and before the execution of the contract aforesaid ordinance No. 937, entitled "An ordinance authorizing the mayor by contract to grant to the Union Pacific Railway Company and the Burlington & Missouri River Railroad Company in Nebraska certain rights and privileges, subject to certain conditions," was duly adopted by the city council of said city, and on the 8th day of September, 1885, was duly approved by the mayor thereof, authorizing and empowering him to execute said contract for the city, and that subsequently, on the 1st day of February, 1886, James E. Boyd, then being the mayor of said city, and by virtue of his office and of the authority conferred upon him by said ordinance, executed the contract as hereinbefore alleged; that a copy of the ordinance referred to is hereto attached and marked "Exhibit B" and is made a part hereof and referred to for greater particularity.

Eleventh. And this respondent further alleges that by virtue of such agreement and in compliance with the terms thereof the said railway companies opened and improved said 7th, 13th, and 20th street- and paid or contributed to the city their said proportion of the cost and damages involved in the construction of the said viaducts, and have otherwise fully performed each and every stipula-
tion of said contract.

27 Twelfth. The respondent further alleges that under the laws of the State of Nebraska and by virtue of the powers and authority vested in it under its then charter, and in compli-

ance with the terms of the contract aforesaid, the city of Omaha constructed the viaducts upon 11th and 16th streets and opened the same for public use at the time stated in the relator's petition; that usbsequently the city council of said city adopted ordinance No. 2017, entitled "An ordinance granting the right to construct and use two (2) tracks over the 11th-street viaduct to the Omaha Motor Railway Company, subject to certain conditions," which was afterwards, on the 20th day of April, 1889, duly approved by the mayor of said city; that a copy of this ordinance is hereto attached, marked "Exhibit C," and made a part hereof; that by virtue of said ordinance, which was duly accepted by the said Omaha Motor Railway Company, it constructed two tracks over the said 11th-street viaduct in accordance with the provisions thereof and entered upon the occupation and use thereof; that from the completion of the viaduct aforesaid, the use thereof by the public, and from the completion of the tracks aforesaid, the use thereof by the said motor company, its successors and assigns, was continued uninterruptedly until some time during the year 1894, when it was discontinued by the public for vehicles and wagons and by the motor company, its successors or assigns, but was not discontinued for pedestrian travel.

Thirteenth. Respondent further alleges that the said 11th-street viaduct is and at all times since its construction has been the property of the city of Omaha and not the property of the said railway companies or either of them; and, further, that under the laws of the State of Nebraska and under the provisions of its former and present charters and under the contract aforesaid it was and
28 is the duty of the relator to maintain said viaduct in good condition for public use and to furnish the same with all repairs made necessary by ordinary wear.

Fourteenth. The respondent further alleges that owing to the condition of 10th street prior to the erection of the viaduct thereon at the place where it intersects and crosses the track of the respondent, The Union Pacific Railway Company, and of certain other railway companies and the danger incident to its use, public travel was largely diverted therefrom to 11th street and the viaduct thereon, and by reason thereof and the use of it by the motor company and the natural travel upon 11th street the flooring or planking of said viaduct became so worn as to require from time to time certain ordinary repairs to keep it in proper and safe condition; that the relator, however, disregarding its duty in that behalf, neglected to furnish these repairs as needed, and thereby permitted the said flooring or planking to become so worn and damaged as to render the further use of the viaduct by the said street railway company and by vehicles and wagons unsafe and dangerous.

Fifteenth. Respondent further alleges that since the construction of the viaduct on 11th street, to wit, on or about January 1st, 1891, a viaduct along 10th street and over the tracks aforesaid was constructed and completed and opened for public use and travel, and owing to the fact that it is much more convenient and safe for public use than 11th-street viaduct, it is and will continue to be occupied

and used by the street railway companies and the public which formerly occupied and used the said 11th-street viaduct.

Sixteen. And this respondent alleges the fact to be that should the several railway companies or any of them herein referred to, by means of extraordinary and summary proceedings of mandamus issuing out of courts having jurisdiction thereof, be compelled
29 to repair the said 11th-street viaduct in accordance with the demands of the city, it would be very little used by wagons or vehicles or by street railway companies, and it is therefore submitted that inasmuch as there is no pressing necessity for the immediate determination of the grave question of fact and law involved in this proceeding, the writ in this case should be denied and the relator remanded to such other redress as is amply provided for in such cases, to the end that the questions involved may receive thorough and careful consideration and trial in the usual and ordinary administration of law.

Seventeen. The respondent further alleges that the viaduct aforesaid covers a space on 11th street of about twelve hundred — fifty (1,250) feet, of which about 400 feet is occupied by the several tracks owned or operated by the railway companies above referred to; that the remainder of such space was, before the construction of the viaduct, somewhat occupied and used by the public for street purposes, and was, under the law, controlled and cared for by the city of Omaha; that the distance from the north line of the space occupied by the track aforesaid to the north line of the viaduct is about seven hundred feet, and this respondent submits that it is not competent for the legislature to put upon the railway companies the burden of maintaining or repairing that portion of the viaduct over such unoccupied space of the said street, as the city would, but for the existence of such viaduct, be required under the law to maintain and repair; that whatever the rule of law may be as to the construction of the viaduct, the city shall be required in any event to con-
30 tribute such proportion of the entire cost of its maintenance and repairs as that part of the street under the viaduct it would in the absence thereof be required to maintain and repair bears to the entire part of the street occupied by said viaduct, and it is submitted that any law authorizing and empowering the relator to impose such costs upon the railway companies named in its petition is unconstitutional and void and an arbitrary and unwarranted exercise of legislative power and contrary to the settled policy of the State of Nebraska and in violation of the several provisions of the constitutions thereof and of the United States.

Eighteen. Respondent further alleges that long prior to the time of the construction of its said single track across 11th street the said Union Pacific Railway Company had acquired and had been using for railway purposes rights of way across 11th street and had occupied the same with a large number of tracks, upon which it operated its trains, to wit, of the width of 300 feet; that, in order to utilize such right of way, it, at the time of the construction of said track, graded its right of way across said 11thstreet, there by leaving along the south line thereof a perpendicular bank of earth of at least

20 feet high; that at the time the respondent constructed its said single track it acquired the right from the city of Omaha, by ordinance, duly passed and approved, to lay the same across 11th street, occupying for that purpose a strip thereof about eight (8) feet in width; that it also at said time excavated said bank of earth for the distance of about 20 feet south of the south line of the Union Pacific Co.'s right of way aforesaid, leaving the said bank in about the same relative condition as the Union Pacific Company had left it, and in this behalf the respondent alleges that the danger incident to 11th street on account of the existence and operation of the said tracks of the Union Pacific Company aforesaid was not
31 materially increased by the acts of the respondent aforesaid, nor was the construction and maintenance of a viaduct upon said 11th street thereby rendered more necessary.

Nineteenth. Respondent further alleges that this track aforesaid is used solely for the purpose of operating a part of its through trains, freight and passenger, through the city of Omaha.

Twentieth. The respondent further alleges that the several tracks, in number about twenty-one (21), are used and operated by the Union Pacific Railway Company and certain other railway companies, as hereinafter shown, not only for their through business, freight and passenger, but also are used by certain of the companies aforesaid for the making up of trains, thereby bringing into constant use, day and night, the tracks aforesaid.

Twenty-one. For further answer respondent alleges that since the year 1886 the Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, has opened a through line of railways, extending from Chicago, Illinois, through Council Bluffs, Iowa, Omaha and Lincoln, Nebraska, to Denver, in the State of Colorado, upon which it operates its freight and passenger trains between the several points aforesaid; that that part of said line extending through the city of Omaha comprises double tracks, which are located across 11th street, and are of the twenty-one (21) tracks above referred to, upon which it operates numerous daily freight and passenger trains, and also numerous special or extra trains, the number of which is unknown to your respondent.

32 Twenty-two. Your respondent further alleges that the Chicago, Milwaukee & St. Paul Railway Company, a corporation created and existing under and by virtue of the laws of the State of ——, has also since the year 1886 opened a through line of railways extending from Chicago, Illinois, to South Omaha, Nebraska, upon which it operates its freight and passenger trains between the points aforesaid; that that part of said line extending through the city of Omaha comprises double tracks, which are located across 11th street and are of the twenty-one (21) tracks above referred to, upon which it operated numerous daily freight and passenger trains, and also numerous special or extra trains, the number of which is unknown to your respondent.

Twenty-three. Respondent further alleges that at the time the railway companies last aforesaid opened their lines of railway

respectively through the city of Omaha as stated each of them acquired by contract of the Union Pacific Railway Company an interest and ownership in the tracks so as aforesaid used and operated by them and has ever since retained the same.

Twenty-four. Respondent further alleges that whatever danger may arise from the location and operation of the tracks herein described across 11th street to the public in the use thereof, or whatever necessities may thereby arise for the maintenance of the viaduct thereon, such danger and necessities arise as much from the use and operation of said tracks by the Chicago, Rock Island & Pacific Railway Company and the Chicago, Milwaukee & St. Paul Railway Company as arises from the use and operation of its single track by this respondent, and should in justice, equity, and law be required, with the other railway companies aforesaid, to contribute each its proper share to the repair and maintenance of said viaduct.

33 Twenty-five. This respondent, further answering, admits that in the year 1887 the legislature of the State of Nebraska passed an act entitled "An act incorporating metropolitan cities and defining, regulating, and describing their duties, powers, and government," by the terms of which all cities in the State of Nebraska then having a population of sixty thousand (60,000) inhabitants or more according to the State census of 1885 and all cities in said State who should thereafter attain a population of sixty thousand (60,000) inhabitants or upwards were declared to be considered and known as cities of the metropolitan class and should be governed by the provisions of said act; that the same was duly approved March 30th, 1887, and took effect from and after its passage; that at and before said date the city of Omaha, according to the State census of 1885, contained a population largely in excess of sixty thousand (60,000) inhabitants and by force of the provisions of said act became and was incorporated thereunder and has since been and is a city of the metropolitan class, subject to all the provisions of the act aforesaid so far as they are constitutional and valid; that by the terms of section forty-eight (48) thereof the mayor and council of said city were empowered to require railway companies owning or operating any railroad track or tracks upon or across any street or streets of the city of Omaha to erect, construct, reconstruct, complete, and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including such viaduct or viaducts as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. Such section also contained several other clauses relating to the subject of viaducts, among them one providing that when two or more railroad companies owned or operated separate lines of track to be crossed by any such viaduct the

34 proportions thereof and of approaches thereto to be constructed by each or the cost to be borne by each to be determined by the mayor and council; also that after the completion of such viaduct the revenue derived therefrom from street railway lines or other lines shall constitute a special fund to be applied to

making repairs to such viaduct, and, furthermore, that all ordinary repairs to any such viaduct or to the approaches thereto should be paid out of such fund or should be borne by the city.

Respondent further alleges that said act contains provisions amending the several provisions of the acts relating to cities of the first class and certain general laws of the State of Nebraska, and also repealing certain provisions of said acts and said laws without making reference thereto in the title, as required by several provisions of the constitution of the State of Nebraska.

This respondent further submits that, so far as the provisions of the act above referred to relating to cities of the metropolitan class are concerned, they do not apply either to 11th-street viaduct or to any other viaduct built prior to the passage of the act, but only to such viaducts as may have been or may be thereafter constructed under its provisions.

Respondent further submits that it is not competent for the legislature to impose upon it the duty of maintaining or repairing the 11th-street viaduct, for the reason that to do so would be in violation of the obligations of the contract hereinbefore recited and contrary to the provisions of the Constitution of the United States.

Respondent further submits that in the allegations contained in the relator's petition wherein is described the several proceedings in its city council and board of public works, as well as
35 the several acts alleged to have been performed by its representatives and officials relating to the repair of the 11th-street viaduct aforesaid, the same were wholly unauthorized and unwarranted and of no effect so far as the respondent is concerned; that the omission of any and all reference to the several railway companies owning and operating tracks across 11th street under the said viaduct, as hereinbefore shown, renders such proceedings unwarranted, arbitrary, unjust, and illegal.

Wherefore your respondent denies that it is liable or bound to maintain or keep in repair or to contribute thereto the said 11th-street viaduct.

Twenty-six. This respondent, further answering, alleges that the Union Pacific Railway Company has heretofore refused and still refuses to recognize the right of the city of Omaha to require it to contribute towards the repair or maintenance or reconstruction of the said 11th-street viaduct, and has refused and still refuses to comply with the ordinance and requirements of the said city in that behalf.

Twenty-seven. Further answering, your respondent submits that the court is powerless in this case to grant the prayer of the relator's petition filed herein, for the reason it is in the nature of an application for a writ of mandamus against the respondent to compel it to repair and maintain a part of the 11th-street viaduct; that the only remedy asked is a mandatory order upon this respondent; that this court is wholly without jurisdiction to proceed by mandamus or other compulsatory process to compel the respondent to repair and maintain the said viaduct.

36 Twenty-eight. Respondent further alleges that G. W. Holdrege is its general manager and chief executive officer west of the Missouri river; that he resides in Omaha, Nebraska, and is within the jurisdiction of this court; that the president and vice-president, stockholders and directors, each and every of them, reside out of the jurisdiction of this court and are at all times beyond the reach of its process; that some of them reside in the various States of the Union, particularly in Iowa, Illinois, and Massachusetts; that none of them reside in the State of Nebraska; that the said G. W. Holdrege, as such general manager or chief executive officer as aforesaid, is wholly without the power or authority to order the maintenance or repair of said viaduct and without power or authority to appropriate any moneys belonging to the company for that purpose; that such authority and appropriation must come, if at all, through the action of the president and board of directors and not otherwise. Wherefore respondent submits that inasmuch as no writ can issue against the property of this respondent, but must be issued against some person having full power and authority to comply with the order made, and inasmuch as the said Holdrege has not the power or authority to comply therewith, and inasmuch as the officers and directors who could comply with the order are beyond the jurisdiction of this court and beyond the reach of its process, it is therefore respectfully submitted that the relator should be remitted to such remedies and proceedings as can be enforced against the property of the respondent and not otherwise.

Twenty-nine. Respondent further alleges that according to the plans and specifications referred to in the relator's petition the estimated cost of repairing the 11th-street viaduct will be about $13,440.00, and that the relator is in this proceeding asking
37 that the respondent be compelled to repair the north one-third (⅓rd) of the viaduct without regard to whether the cost of repairing such portion will be one-third (⅓rd) of the cost of repairing the entire viaduct, and it is submitted that the question of apportioning the costs of the said repairs between the several railway companies referred to is one for the courts, and this respondent submits that there are no facts stated in the relator's petition upon which it can be judicially determined what will be a fair and equitable distribution of the said cost of repairs among the several railway companies liable, if they should be so held therefor.

Thirty. This respondent further alleges the fact to be that the attempt of the city council and board of public works, described in the relator's petition, to apportion the cost of repairing and maintaining the north one-third (⅓rd) of the said viaduct to this respondent was and is arbitrary and unwarrantable, unequitable, and an discriminating act against it, and is also without jurisdiction or support either in law or in equity.

Thirty-one. Respondent further submits in this behalf that whatever view the court may take of the law or of its obligations in the premises it is incompetent for the relator to either select or prescribe the material for or the cost of the repairs necessary for said viaduct; that such question is brought into court only for its con-

sideration and determination, and that in the absence of any showing the court ought not to issue the peremptory writ of mandamus.

Wherefore your respondent alleges that no claim at law or in equity exists in behalf of the relator against it, and asks that the writ herein prayed for be denied, and that it be dismissed hence without costs.

38 CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, *Respondent*,
By CHARLES J. GREENE.

STATE OF NEBRASKA, } ss:
Douglas County, }

Charles J. Greene, being first duly sworn, on his oath says that the defendant is a corporation; that he is its attorney and is acquainted with the facts alleged in the foregoing answer, and that the same are true, as he verily believes.

CHARLES J. GREENE.

Subscribed in my presence and sworn to before me this 6th day of March, A. D. 1895.

E. S. GARRETT,
Notary Public.

[SEAL.]

"EXHIBIT A."

Viaducts—11th and 16th streets.

Articles of agreement, executed in triplicate, made and concluded this first day of February, 1886, by and between the City of Omaha party of the first part, and the Union Pacific Railway Company and the Omaha & Southwestern Railroad Company, parties of the second part, witnesseth:

That the said parties of the second part, in pursuance of the provisions of an act of the legislature of the State of Nebraska, entitled "An act to provide viaducts, bridges and tunnels in certain cases in cities of the first class," do hereby assume and agree to pay as may be required by the mayor and city council of said city three-fifths of the entire cost of constructing a viaduct along Eleventh street and three-fifths of the damages to abutting property on
39 account of the construction of such viaduct not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars ($90,000.00), the amount so assumed and agreed to be paid, being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part, as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company, and one-fourth thereof to be paid by said Omaha & Southwestern Railroad Company.

The said parties of the second part, in pursuance of the provisions of said act, also assume and agreee to pay, as may be required by said mayor and city council, three-fifths of the entire cost of con-

structing a viaduct along Sixteenth street in said city over the railroad tracks of said parties of the second part, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of thirty thousand dollars ($30,000) the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part, as follows: Two-thirds thereof to be paid by said Union Pacific Railroad Company, and one-third thereof to be paid by said Omaha & Southwestern Company.

The plans and specifications for said viaducts before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective pro-
40 portions of such increased cost and damages, in the same manner and according to the same division as hereinbefore agreed.

The said parties of the second part also agree, during the present year (1886) to open Seventh street in said city through their rights of way, so as to leave a clear and unobstructed roadway fifty feet in width from curb to curb, and sidewalks ten feet in width on each side of said roadway and outside of said curbs, thereby making a total opening of seventy feet, and to build proper, substantial stone retaining walls on the outside of said walks, and make sufficient and suitable provisions for lighting said walks and roadway, and thereafter, both day and night, keep said walks and roadway well and sufficiently lighted, so as to enable teams and pedestrians, at all times, to use the same, the said parties of the second part to have the right to place iron posts in line with said curbs, to support the superstructure or bridge over the same.

The said parties of the second part also agree to open Thirteenth street in said city through their rights of way, so as to leave a clear and unobstructed roadway sixty feet in width from curb to curb, and sidewalks twenty feet in width on each side of said roadway and outside of said curbs, thereby making a total opening of one hundred feet, and to build proper, substantial stone retaining walls on the outside of said sidewalks, the said parties of the second part to have the right to place iron posts in line with said curbs to support the superstructure or bridge over the same.

The said parties of the second part also agree to open Twentieth street in said city through their rights of way to the full width of said street.

41 In consideration of the full performance by said parties of the second part of the foregoing agreements, the City of Omaha, party of the first part, hereby agrees by ordinance, to close the following streets across the present rights of way of said parties

of the second part, to wit: Sixth street, Twelfth street, Fifteenth street.

It is also agreed that Eighteenth and Nineteenth streets in said city are to remain as at present.

It is also agreed that Fourteenth street in said city across the present rights of way of said parties of the second part, shall remain the same as it now is until the completion of said Sixteenth-street viaduct, and then, if it shall be declared by the mayor and council that public necessity demands, it shall be opened by said parties of the second part in such manner as the mayor and council may require, not exceeding thirty feet in width.

In witness whereof, the said parties hereto affix their names at Omaha, Nebraska, this first day of February, 1886.

(Signed) THE CITY OF OMAHA,
By JAMES E. BOYD, *Mayor.*
UNION PACIFIC R'L'Y CO.,
By S. R. CALLAWAY, *General Manager.*
OMAHA & SOUTHWESTERN R. R. CO.,
By G. W. HOLDREGE.

In presence of—
H. KOUNTZE.

"EXHIBIT B."

Ordinance No. 937.

An ordinance authorizing the mayor by contract to grant to the Union Pacific Railway Company and the Burlington & Missouri River Railroad Company in Nebraska certain rights and privileges, subject to certain conditions.

42 Be it ordained by the city council of the city of Omaha:

SECTION 1. That the mayor of the city of Omaha be, and hereby is, authorized and empowered to enter into an agreement and contract with the Union Pacific Railway Company and the Burlington & Missouri Railroad Company in Nebraska, whereby, in consideration of the said railroad companies assuming three-fifths of the cost, including damages to abutting property, of a viaduct crossing the railroad tracks of said companies on Eleventh street in said city, commencing at or near Jackson street and extending to or near Mason street, according to such plans as may be adopted by the mayor and council, the same to be constructed as soon as possible, and as soon as said mayor and council may require, and complying with an act of the legislature of the State of Nebraska, entitled "An act to provide for viaducts, bridges and tunnels in certain cases in cities of the first class," approved March 4th, 1895, the city will close Sixth street from the north line of Pacific street to the south line of the alley between Mason and Marcy streets, and Twelfth street between blocks 201 and 202, and so much of Marcy street as lies in line of Twelfth street and is covered by right of way. The city, in consideration of the premises, is also to

permit and allow said companies, at their own expense, to bridge Seventh street in said city along their respective rights of way, but in such manner as will leave a clear roadway of fifty feet from curb to curb, and a space of ten feet outside of said curb for sidewalks, and so as to allow reasonable and proper ventilation and admit sufficient light, the said companies, at their own expense, to keep the space under the portions of the bridge constructed by each respectively sufficiently lighted at all times by either natural or artificial light, and said companies are also to have the right to
43 bridge Thirteenth street, but so as to leave a clear roadway of sixty feet from curb to curb and a space on the outside of each of said curbs of twenty feet for sidewalks, and so as to admit of ventilation and light, and are also to have the right to place iron posts for the support of said bridges over said Seventh and Thirteenth streets, on the line of said curbs.

SECTION 2. This ordinance shall take effect and be in force from and after its passage.

Approved September 8, 1885.

"EXHIBIT C."

Ordinance No. 2017.

Omaha Motor Railway Company to Use Eleventh-street Viaduct.

An ordinance granting the right to construct and use two tracks over the Eleventh-street viaduct to the Omaha Motor Railway Company, subject to certain conditions.

Be it ordained by the city council of the city of Omaha:

SECTION 1. That the right to construct and use two tracks over and along the Eleventh-street viaduct, in the city of Omaha, is hereby granted to the Omaha Motor Railway Company of Omaha, subject to the following conditions, to wit:

The said Omaha Motor Railway Company shall obtain such changes as may be necessary in the roadway of said viaduct for the purpose of laying said tracks, and pay the cost thereof, as well as all costs or expense caused or made by reason of laying said tracks on said viaduct; and shall keep said tracks in good condition and pave and repave between the rails of said tracks, as its own expense, at such times and in such manner as the mayor and city council may by ordinance require.

44 SEC. 2. Said motor railway company, after entering upon said viaduct for the purpose of laying their tracks, shall prosecute the work with all possible speed and complete the same without delay, and with the least possible inconvenience to the public use of said viaduct; and the rails to be used on said viaduct shall have wide flanges so as to accommodate the wagon travel of the viaduct; and the rails shall be kept on a level with the general roadway. Said work shall be done under the supervision and direction of the city engineer and board of public works.

SEC. 3. The use of said tracks by said company, and the manner and time of running cars thereon, shall at all times be subject to such reasonable rules and regulations as may be prescribed by ordinance.

SEC. 4. The tracks over and along said viaduct, and the approaches and tracks leading to said viaduct to the distance of 600 feet from either end of the viaduct, may be used by such other street railway companies as the mayor and council, by ordinance, may grant the right so to do, upon such terms and conditions as may be by ordinance provided.

SEC. 5. The rights and privileges herein granted are upon the further condition that for the use of said viaduct said Omaha Motor Railway Company shall pay for the first five years a nominal rental of five ($5.00) dollars per year, and such other railway companies to whom may be granted the right to cross said viaduct shall be governed by the same condition.

The said Omaha Motor Railway Company, or other companies to whom the right may be granted upon the expiration of said five years shall pay such reasonable annual rental to the city as may from time to time be fixed and determined by ordinance.

45 SEC. 6. The said Omaha Motor Railway Company, shall within six months after the passage of this ordinance, operate a double-track line of street cars across said viaduct along Eleventh street as far south as Vinton street, and shall hereafter continue to operate said line in the manner herein prescribed.

SEC. 7. The rights and privileges herein granted are also subject to the approval of the railroad companies contributing toward the construction of said viaduct.

SEC. 8. The said Omaha Motor Railway Company shall protect the city against any claim or action for damages resulting from the use of said viaduct by said company, or which may be caused by the negligence of said company.

SEC. 9. The Omaha Motor Railway Company, to obtain any right or benefits granted, shall, within thirty days from the passage of this ordinance, file with the city clerk a written acceptance of all the provisions and conditions hereof; but such acceptance shall in no event be construed as a waiver of any existing rights conferred upon such company by its charter.

SEC. 10. The Omaha Motor Railway Company shall, at the time they accept the provisions of this ordinance, file a bond with the city in the sum of twenty thousand ($20,000) dollars for the faithful performance of the provisions of the ordinance; said bond to be signed by two sureties, subject to the approval of the mayor and city council.

If the Omaha Motor Railway Company, after it shall accept the terms and conditions of this ordinance, shall fail to comply with the terms and conditions of this ordinance, then the Omaha Motor Railway Company shall forfeit its rights under this ordinance, whenever the mayor and council shall so determine by ordinance or concurrent resolution.

46 SEC. 11. That this ordinance shall take effect and be in force from and after its passage.

Approved April 20th, 1889.

Accepted by Omaha Motor Railway Company April 23, 1889.

Afterward, on the 10th day of April, 1895, this cause came on to be heard before his honor Judge G. W. Ambrose upon the petition and answer herein and the evidence in support thereof and was duly submitted.

Afterward, on the 19th day of April, 1895, and after due consideration, a decision herein was rendered and filed herein as follows, to wit:

Opinion of Court.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator,
vs.
THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.
} Opinion of the Court.

Opinion by AMBROSE, judge, of February term, 1895:

This is an application for the issuance of a peremptory writ of mandamus to compel the respondent to repair the south one-third of the viaduct on Eleventh street between Mason and Jackson.

It is claimed by the relator that under and by virtue of the terms of section 48 of the act of the legislature of 1893 relating to metropolitan cities, that it is within the power of such cities to compel railroad corporations like the respondent to repair such viaducts. So much of said section as is relevant is as follows:

"The mayor and council shall have the power to require any railway company or companies owning or operating any railway track or tracks upon or across any public street or streets of
47 the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets, and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and city council necessary for the safety and protection of the public." * * *

Under the power thus granted the proper city authorities, in December, 1893, declared, by proper and appropriate legislation, the necessity for requiring this viaduct to be repaired, in order to protect the safety of the public. No contention is here made as to the regularity of such proceedings. The Chicago, Burlington & Quincy railroad is the successor of what was formerly known and incorporated as the Omaha & Southwestern railroad. That railroad was incorporated under an act of the legislature in force in the year 1866, and the contention is made that by reason of the act of the legislature

under which the then incorporation was had, that it is not within the power of the legislature now to impose the additional burden sought to be imposed by reason of section 48 of the act of 1893.

Section 83 of chapter 25—subdivision, railroad companies—of the act of 1866 is as follows:

"If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officers or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied;" * * *

48 By section 86 of the same act it is provided:

"Any railroad company may construct and carry their railroad across, over or under any road, railroad, canal, stream or water-course, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct their railroad crossing as not necessarily to impede the travel, transportation or navigation upon the road, railroad, canal, stream or water-course so crossed."

In March, 1885, an act to provide for viaducts, bridges, and tunnels in certain cases in cities of the first class, such as Omaha, there was provided that the mayor and city council of such city should have the power under certain circumstances to engage and aid in the construction of any viaduct by contract and agreement with railroad companies. This act was simply permissive; there was nothing mandatory about it. Under the powers thus granted in February, 1886, the city of Omaha, the Union Pacific Railway Company, and the Omaha & Southwestern Railroad Company entered into a contract for the erection of the Eleventh-street viaduct. It is unnecessary at this time to enter into a full understanding of what the terms of that contract were, except to say that by the terms of the contract thus voluntarily made between these three parties it was provided that the railroad companies should pay three-fifths of the cost of the construction and the damages to abutting property-owners, and the city two-fifths. In the apportionment between the two railroad companies this respondent company was to pay one-third and the Union Pacific Railway Company two-thirds of the three-fifths. Under this contract the viaduct was built and has become fully executed.

In 1887, two years after the passage of the last act mentioned, and by the terms of section 48 of the act, then for the first

49 time creating incorporations of metropolitan cities, it was provided: "That the mayor and council shall have the power to require any railroad company, or companies owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets, and over or under such track or tracks, including the approaches to such viaduct or viaducts as may be deemed and declared

by the mayor and council necessary for the safety and protection of the public."

It was further provided in the same section: "After completion of any such viaduct, any revenue derived therefrom by the crossing thereof of street railway lines, or otherwise, shall constitute a special fund, and shall be applied in making repairs to such viaduct. All ordinary repairs to any such viaduct, or to the approaches thereto, shall be paid out of such fund, or shall be borne by the city." This is the first time that any mandatory legislation was passed by the legislature.

It will be seen by a careful reading of the section just referred to that while the legislature granted the power to cities of the metropolitan class to require railroad companies to keep in repair any such viaduct as the one here in question, it was also provided that ordinary repairs should be paid out of the fund derived from the revenue of street railway lines, or otherwise, or shall be borne by the city. Thus the legislation rested until the passage of the act of 1893, to which I have above referred. In addition to the power granted to the mayor and common council to require any railway company or companies to construct, reconstruct, and keep in repair any viaduct, which I have already quoted, it was further provided:

50 "When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct the proportion thereof and all the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies upon being required as herein provided, to erect, construct, reconstruct or repair any viaduct, to proceed within the time and in the manner required by the mayor and the council." * * *

And then follows to the end of the section certain remedies for the enforcement of the duty thus required.

Under this legislation an extended and very vigorous argument has been made, the contention being that by reason of the legislation of 1866 and the constitution of this State in force at the time of the organization of the Omaha & Southwestern Railroad Company it is beyond the power of the legislature to impose the burden now sought to be imposed under the act of 1893, for the reason that the charter of the respondent railroad company was a contract, and any such attempt as is now here sought by this legislation is an impairment of the obligation thus created between the State and the respondent company.

If such be the law of the land, it is as well now as ever that this State become aware of it. A corporation is but a creature of the sovereignty. Corporate property has a public as well as a private si'e. Does the State, by granting charter rights to corporations, completely abnegate to and surrender control of these public agencies? Every person, human or artificial, holds his or its property subject to the control of the State whenever the public peace or safety is in question. Any contrary doctrine would be the

51 announcement of the right of private and corporate socialism,

either of which is a public as well as a private menace, and, independent of authority, upon principle alone, I for one should have no hesitation in saying that by the granting of the privilege to any number of individuals to form a corporate existence that the State does not thereby surrender all power and control over such a corporation.

As is said by that eminent jurist and law-writer, John F. Dillon, American Law Review, March and April, 1895: "The domain of the State over the action of its corporations is supreme within the limits of their constitutional rights, which are mainly rights of property. The State may with strong hand suppress every form of combination, whether corporate or individual, which proves hurtful to the general good. The State can bridle its corporate agencies and keep them under effective and salutary control; it can forbid all persons, whether corporate or natural, from courses of action harmful to the public welfare. * * * The State's plain duty is to see that the just interests of the public are protected and secured, so far as law can do this consistently with the rights of others. * * * The principle on which the State may intervene is plain. If and in so far as such combination shall be found tending to create monopolies, to destroy legitimate and useful competition, thus interfering with the free industry of the people, yield undue profits at the expense of the consumer, thereby facilitating the creation of enormous private fortunes and the protection of the inequality of wealth—if such shall be seen or found to be their effect, the State has the power to correct the evil, and it would be its duty to call that power into vigorous activity."

52 If the State has this power, can it be doubted that notwithstanding the fact there was no limitation of the constitution of 1866 or the acts of the legislature passed in conformity thereto that the legislature now has the power to regulate the running of the trains of the respondent company over or across the street in question or from providing any safe transit for the commerce of the city over its railway tracks? Such an invasion upon the power of the legislature would be a complete surrender of the streets of the city to the control of the railroads and make the use of the streets for its municipal commerce subject to the whim of every railway corporation passing through the municipality.

Take, for instance, the litigation that sprung up in this city several years ago over the construction of our present street-car system. The legislature of 1866 passed a special act granting to the Omaha Street Railway Company the exclusive privilege of laying its tracks and operating a line of street railway within the city of Omaha. Under the constitution of 1875 and legislation subject thereto another corporation was formed, known, in short, as the Mercer corporation. Immediately upon an attempt to use the streets in the city serious litigation arose, and it was carried into the Federal courts. There the plea was strongly urged, and by some of the greatest lawyers in the country, that the original corporation had exclusive franchise in the streets in the city of Omaha, and that it was incompetent for the legislature to confer the power upon any

other set of men to organize a corporation and divest them of their rights under their original charter. Judge Brewer, sitting upon the circuit bench, held to the contrary.

53 Every citizen when he comes within the confines of this State does so with the knowledge that he will be allowed to operate his business affairs and conduct and control his property according to the law then in force, and also in accordance with such amendments imposing additional burdens thereon as shall in the wisdom of the legislature seem beneficent and for the best promotion of the public good.

The case of Jones *vs.* Davis, 6 Neb., 33, arose by reason of legislation which was passed after the execution of the mortgage involved in that suit, and which legislation changed the mode of ascertaining the value of property prior to its sale. Under the law as it stood when the contract was executed the appraisement was required to be made regardless of any incumbrances that might be resting upon it, and the sale must have been for at least two-thirds of the value of the property thus ascertained while under the legislation in force when the foreclosure took place; incumbrances were to be deducted, and from the sum total thus derived the sale was to be had for two-thirds of the then value. It was strenuously urged in that case, and supported by authority, not only of the Supreme Court of the United States under similar legislation in the State of Illinois, but from a variety of the States in the Union, that such a change of the legislation was an impairing of the obligation of the contract. But the supreme court of this State held otherwise—that it did not in the least effect the obligation of the contract.

In State *vs.* Missouri Pacific R'y Co., 5 Pac. Rep., 772, is a case much like the one in question. It is said:

54 "A railroad company is a quasi-public corporation, and all its rights and powers are conferred upon it, not merely for the benefit of the corporation itself, but also in trust for the benefit of the public, and whenever it neglects or fails to perform any of its corporate duties it may be compelled to perform the same by mandamus. The duty resting upon a railroad corporation to perform whatever has been legally enjoined upon it by legal and proper authority is a duty resulting from a public trust and is also a duty resulting from a public station, and the public may enforce the performance of such duty by mandamus whenever no other plain and adequate remedy exists. * * *

"The question is," continues the court, "whether a city of the first class has the power to order a railroad company to construct a viaduct over its tracks when the same cross a public street. We think it is. In this State all cities are invested with entire management and control of public streets within their boundaries. They are the representatives of the public in this respect, and may generally make any order concerning the streets that could be made by the legislature or by any other agency or instrumentality acting for the public." * * *

And further: "A railroad company has no right to render the streets of a city unsafe or dangerous, and in all cases where a rail-

road company is permitted to use a street for railroad purposes it should be compelled to restore the street, as far as practicable, to the same condition of safety and usefulness as the street would occupy if it were not used for railroad purposes at all, and the railroad company should be compelled to maintain this condition of safety and usefulness as long as it continues to use and occupy the street."

55 This is supported by a long line of authorities. The legislation in Kansas was subsequent to the incorporation of the defendant railroad company.

The finding of the proper city authorities under the legislation which has taken place under the act of 1893 is that this viaduct is dangerous. This is not questioned by the respondent.

In section 1054, second volume, Morawetz on Corporations, that author says, in speaking of the power of amendment of articles of incorporation and the impairment thereby of contract rights: "At the present day, however, corporations are usually formed under general laws, which extend the right of forming corporations to all persons. There is no more reason for holding that the formation of a corporation pursuant to such general law gives rise to a contract with the State than that the formation of a limited partnership or joint stock company or the execution of any other executory contract authorized by the general law involves the creation of a collateral contract with the State that the parties to the agreement shall be allowed to perform." The same author says, paragraph 1062: "That corporations are subject to the law-making power of the State to the same extent as unincorporated individuals is obvious. When the legislature of a State grants to a number of persons the right of forming a corporate association it clearly does not intend to emancipate them forever after from the law-making power of the State in respect to their corporate acts and rights, nor would the legislature have the power to do this."

It is claimed by counsel for respondent that the legislation of 1893, section 48, wherein it provides that the duty required of railroads to construct, reconstruct, and repair viaducts may be enforced by mandamus or by fine, or that if the company

56 should refuse to obey the demand of the city to construct or repair such viaduct that the city may do so and collect the necessary cost from the defendant company, is unconstitutional, and that such legislation is not germain to the original section 48 as it stood in the act of 1887, which was amended by the act of 1893.

I do not consider the determination of this question material in this case. The remedy by mandamus to enforce this duty and obligation of a railroad company was sufficient without this legislation. State *vs.* C., B. & Q., 29 Neb., 413.

That portion of the section referring to the right of the city to construct and then collect from the defendant company is but cumulative, made so expressly by the very terms of the section, but without the express terms of this section making this remedy cumulative it has been repeatedly held in this State that notwithstand-

ing there may be a cumulative remedy that that will not prevent the court from granting the writ of mandamus.

While no contention is made as to the sufficiency of the proceedings under the legislation of 1893 by the mayor and city council, yet it is urged that the arbitrary finding in this case requiring the respondent to repair the south one-third of the viaduct is inequitable under the facts as here developed. These facts are, shortly: At the time this viaduct was built, as already indicated, it was by contract between the city and the two railroad companies then operating the line of tracks across Eleventh street. The respondent company owns and operates one track. The Union Pacific Railway Company, together with the Milwaukee and the C., R. I. & P. Railway Companies, occupy and operate the remaining twenty-one tracks. Under the original contract the Union Pacific was to pay two-thirds of the three-fifths and this respondent one-third of the three-
57 fifths of the cost of construction of the viaduct. Since then the Milwaukee and C., R. I. & P. Companies have by lease acquired from the Union Pacific Railway Company, which practically amounts to an ownership, the right to operate these tracks.

Under legislation of 1893 it is provided that the city shall have the power to require railroad companies owning or occupying the tracks to construct, reconstruct, and repair the viaduct.

Under this state of facts it seems to me that the arbitrary requirement of the absolute repair of one-third of the viaduct in question is inequitable, but the power to so require is vested by the legislature absolutely in the city council; yet the supreme court of this State in the case of Hanscom *vs.* Omaha, 11 Neb., 42, refused to sanction the absolute authority of the city council upon a question of like import. I do not now intend to decide whether the requirement in behalf of the city is equitable and just or not. So far as I may and make this order final, I desire to reserve that question for future consideration, and if, in the judgment of the supreme court, the solution arrived at by me is correct, then the question of determining the proper proportion to be borne by this respondent, in view of the above facts, will be further considered and ultimately determined. With this simple expression of what I deem should be the ultimate result of this case, the writ of mandamus will issue as prayed.

Afterward, on the 20th day of April, 1895, a motion for new trial was filed herein as follows, to wit:

Motion for New Trial.

In the District Court of Douglas County, Nebraska.

58 THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, *vs.* THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent. } Motion for New Trial.

Comes now The Chicago, Burlington & Quincy Railroad Company, respondent herein, and moves the court to vacate the judgment and final order heretofore rendered herein and to grant a new trial for the following reasons:

1. The judgment is not sustained by any evidence.
2. The judgment is against the weight of evidence.
3. The judgment is contrary to law.
4. The court erred in admitting testimony offered by relator and objected to by the respondent and to which in that particular respondent then and there excepted.
5. The court erred in excluding testimony offered by the respondent, to the ruling of which in that particular the respondent then and there excepted.
6. Errors of law occurring at the trial and duly excepted to by the respondent.
7. The court erred in granting a peremptory writ of mandamus herein.
8. The court erred in holding that the relator had any power or authority to require or compel the respondent to repair the 11th-street viaduct.
9. The court erred in holding that relator had any power conferred on it by virtue of chapter twelve of the Compiled Statutes of Nebraska, 1893, to require respondent to repair the 11th-street viaduct or any part thereof.

59 10. The court erred in holding that the provisions of section 48 of the charter creating cities of the metropolitan class, as amended in 1893, did not impair the obligations arising out of the contract between this respondent and the relator relative to the construction of the 11th-street viaduct.

11. The court erred in holding that the relator, under the terms of the contract of 1886 between the relator and this respondent and the laws, then subsisting relative thereto and subsequent amendments, was not bound to repair the 11th-street viaduct.
12. The court erred in not holding section 48 of an act entitled "An act incorporating metropolitan cities, etc.," as amended in 1893, unconstitutional.
13. The court erred in failing and refusing to determine and adjudicate the issues made by the pleadings in this case.
14. The court erred in failing and refusing to determine the sufficiency, validity, and constitutionality of ordinance No. —, a copy

of which was attached to the respondent's answer marked Exhibit —, and by way of reference made a part thereof.

15. The court erred in holding that the charter of the predecessor of this respondent and an ordinance No. 729 of the relator did not constitute a contract between this respondent within the meaning and protection of the constitution of Nebraska and the United States guaranteeing the inviolability of contracts.

16. The court erred in holding that the State of Nebraska had any warrant or authority to alter or amend the charter of this respondent or its predecessor under the corporate name of the Omaha & Southwestern Railroad Company.

60 17. The court erred in holding that the alleged right in the relator to require this respondent to repair the 11th-street viaduct as expressed in section 48 of the act creating metropolitan cities, as amended in 1893, was an exercise of power reserved in the legislature to alter or amend the charter of this respondent.

18. The court erred in holding that the provisions of section 48 of the act relating to metropolitan cities as amended in 1893, requiring railroads to repair viaducts, was in virtue of the police powers of the State of Nebraska.

19. The court erred in holding that section 48 of the chapter relating to metropolitan cities, as amended in 1893, had any reference to viaducts theretofore constructed.

20. The court erred in holding that section 48 of the charter relating to metropolitan cities, as amended in 1893, had any reference to the repair of the viaduct in controversy or any other viaduct then in existence.

21. The court erred in holding that the relator was not bound as a matter of law to repair the viaduct in controversy.

22. The court erred in exercising jurisdiction herein for the reason that there was a defect of parties respondent.

23. The court erred in holding that relator had any authority conferred on it by section 48 of the charter relating to metropolitan cities and, as amended in 1893, to determine upon and select the materials for the repair of the viaduct in controversy.

24. The court erred in holding that the relator had no adequate and clear remedy provided by law for the repair of the viaduct in controversy.

61 25. The court erred in compelling this respondent to arbitrarily repair one-third of the viaduct in controversy, when, as a matter of fact, this respondent only owned and operated a single track out of twenty-one or more tracks which crossed 11th street under said viaduct, that requirement being arbitrary, unjust, inequitable, unreasonable, and unconstitutional.

26. The court erred in granting the writ herein for the reason that obedience to the commands of the same by this respondent would not repair the viaduct in controversy.

27. The court erred in granting the writ herein for the reason that the Union Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company, which own and operate, either jointly or sev-

erally, twenty or more of the tracks which cross said 11th street beneath said viaduct, are necessary parties in order to determine the proportion each should bear, including this respondent, in the cost of or the repair of the viaduct in controversy.

28. The court erred in not holding that the repairs sought to be made in this case was an exercise of the police power of the State.

29. The court erred in holding that the several remedies provided for in section 48 of the charter relating to metropolitan cities, as amended in 1893, were cumulative.

30. The court erred in holding that the ordinance of the relator, marked Exhibit —, attached to the respondent's answer and by way of reference made a part thereof, was without authority, unwarranted, and void, in this: that it exempted the Chicago, Rock Island and Pacific Railway Company and the Chicago, Milwaukee &
62 St. Paul Railway Company, two several railroads engaged in the operation of one or more of the tracks which cross 11th street beneath the viaduct in controversy, from the burden of the cost of the repair of said viaduct.

31. The court erred in granting the writ herein for the reason as stated in respondent's answer—the officers of this respondent who have power to obey the commands of such writ are beyond the jurisdiction of this court.

32. The court erred in not deciding that the apportionment of one-third of cost of repairing viaduct to this respondent was inequitable, unjust, and arbitrary, and, further, in not deciding that the action of the city council in making such apportionment was subject to review in this proceeding.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,
By C. J. GREENE, *Its Attorney.*

Afterward, at the February term of said court and on the 1st day of May, 1895, said motion for new trial was overruled herein as follows, to wit:

Motion for New Trial Overruled.

STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, *vs.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.	Order Overruling Motion for New Trial.

On this day the motion for a new trial filed herein by said respondent came on to be heard and was argued by counsel, and, the court being fully advised in the premises, it is considered, ordered, and adjudged that said motion be, and the same is hereby, overruled; to the overruling of which said motion the said respondent

duly excepts. The respondent given 40 days from rising of
63 court to prepare and serve bill of exceptions.

G. W. AMBROSE, *Judge.*

May 1, 1895.

Afterward, on the 1st day of May, 1895, a peremptory writ of mandamus was issued herein as follows, to wit:

Peremptory Writ of Mandamus.

STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator, *vs.* CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.	Order Allowing Peremptory Writ.

On this day this cause came on to be heard upon the petition and application for mandamus of said relator filed herein and upon the alternative writ of mandamus heretofore issued, and the answer and return thereto as made and filed herein by said respondent, and the evidence, and was duly argued by counsel and submitted to the court; on consideration whereof the court finds the issues in favor of the said relator, and that said relator is entitled to a peremptory writ of mandamus, as in its said petition and application prayed.

It is therefore considered, ordered, and adjudged by the court that a peremptory writ of mandamus issue against the Chicago, Burlington & Quincy Railroad Company, commanding and requiring said Chicago, Burlington & Quincy Railroad Company to repair that portion of the Eleventh-street viaduct in the city of Omaha, Douglas county, State of Nebraska, commencing at the south end of said viaduct and extending northward a distance of one-third the entire length of said viaduct, the said repairs to be made in accord-
ance with the requirements of ordinance No. 3752, duly
64 passed by the city council of said city January 30, 1894, and approved by the mayor of said city February 2, 1894, and in accordance with the plans and specifications prepared and submitted by the city engineer and board of public works of said city, approved by the mayor of said city February 2, 1894, the said repairs to be commenced immediately and carried forward without unnecessary delay.

It is further considered, ordered, and adjudged that the said Chicago, Burlington & Quincy Railroad Company pay the costs of this action, taxed at $—.

G. W. AMBROSE, *Judge.*

Afterward, on said 1st day of May, 1895, a stipulation was filed herein as follows, to wit:

Stipulation.

In the District Court, Douglas County, State of Nebraska.

STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator,
vs.
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.
} Stipulation.

It is hereby stipulated and agreed by and between the parties above named that the said respondent shall, without unnecessary delay, cause to be prepared and settled a bill of exceptions herein, and immediately thereafter file the same with a petition in error in the supreme court of the State of Nebraska, and secure without unnecessary delay an early and speedy hearing in said supreme court of said cause, to which the relator will make no objection and will favor, and until such hearing and the final determination of said supreme court the issuance of the peremptory writ of mandamus allowed herein shall be delayed.

W. J. CONNELL,
Att'y for Relator.
C. J. GREENE,
Attorney for Respondent.

65 Afterward, on the 8th day of May, 1895, a certified copy of said peremptory writ of mandamus was returned, with the sheriff's return thereon, and filed herein as follows, to wit:

Sh'ff's Return on Copy of Peremptory Writ of Mandamus.

STATE OF NEBRASKA, } *ss:*
Douglas County, }

Received this writ on the 4th day of May, 1895, and served same on the 6 day of May, 1895, on the within-named Chicago, Burlington & Quincy Railroad Company by delivering to George W. Holdrege, the managing agent of said corporation, personally, in Douglas county, Nebraska, a true and duly certified copy thereof, with all the endorsements thereon, the president or other chief officer of said corporation not being found in Douglas county.

JOHN C. DREXEL, *Sheriff,*
By H. ROSENZWIG, *Deputy.*

Fees ..... .75
Mil. ..... .10
.85

Certificate.

STATE OF NEBRASKA, } ss:
Douglas County, }

I, Frank E. Moores, clerk of the district court in and for Douglas county, Nebraska, do hereby certify that the foregoing is a true transcript of the proceedings in the case of State of Nebraska *ex rel.* The City of Omaha, relator, against Chicago, Burlington & Quincy Railroad Company, respondent, appearing of record in said court. I do further certify that the bill of exceptions hereto attached and made a part of this transcript is the original bill of exceptions filed in the office of the clerk of said court in the above-entitled action.

66 Witness my signature and the seal of said court, at the city of Omaha, this 11th day of June, A. D. 1895.

[SEAL.] FRANK E. MOORES, *Clerk.*

Green & Breckenridge, attorneys for respondent, have paid $23.65 for this transcript.

[SEAL.] FRANK E. MOORES, *Clerk.*

(Endorsed:) 7805. C., B. & Q. R. Co. *v.* State *ex rel.* Omaha. Transcript. Supreme court of Nebraska. Filed Jun- 12, 1895. D. A. Campbell, clerk.

67 48, # 349.

In the District Court of Douglas County, Nebraska.

THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Relator,
vs.
THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Respondent.
} Bill of Exceptions.

Filed Jun- 5, 1895.

FRANK E. MOORES, *Clerk.*

* * * * * * *

68 Received from Hon. C. J. Greene and Hon. Charles F. Manderson, for examination and amendment, a draft of a bill of exceptions in the case of The State of Nebraska *ex rel.* The City of Omaha, relator, *vs.* The Chicago, Burlington & Quincy Railroad Company, respondent, tried in the district court of Douglas county, Nebraska, at the regular February term thereof, A. D. 1895. Dated ——.

—— ——,
Attorney for Relator.

I herewith return the draft of bill of exceptions in the above-entitlsd cause and propose the following amendments thereto. Dated ——.

—— ——,
Attorney for Relator.

69 It is hereby stipulated and agreed by and between the parties hereto, relator and respondent, that the following is a true and complete copy of all the evidence, oral and documentary, introduced upon the trial of the within-entitled cause, together with all objections and exceptions thereto and rulings of the court thereon.

W. J. CONNELL,
Attorney for Relator.

Dated June 4th.

CHAS. J. GREENE,
CHAS. F. MANDERSON,
Attorneys for Respondent.

The within contains all the evidence offered or given by both parties upon the trial of this case, and on application of the respondent herein this bill of exceptions is allowed by me and ordered to be made a part of the record in this case.

G. W. AMBROSE, *Judge.*

Dated 6, 4, '95.

70 Be it remembered that in the district court within and for the county of Douglas, State of Nebraska, at the regular February term of said court, in the equity division thereof, to wit, on the 10th day of April, 1895, before the Honorable G. W. Ambrose, one of the judges of said court; Hon. W. J. Connell appearing for the relator, and Hon. C. J. Greene and Hon. Charles F. Manderson appearing for the respondent, the following proceedings were had, viz:

It is stipulated and agreed that the allegations in paragraph 2 of the petition are true and correct.

By Mr. CONNELL: I now offer in evidence the original resolution referred to in the petition, of which a copy is attached, marked "Exhibit A," directing the committee on viaducts and railroads and the city engineer to examine the roadway and road-bed of the Eleventh-street viaduct, and report to the council regarding the necessity for repaving the same.

Objected to as immaterial and irrelevant. Objection overruled. Copy hereto attached. Respondent excepts.

By Mr. CONNELL: We offer in evidence the report of the committee on viaducts and railways, the original report, of which a copy is attached to the petition, marked "Exhibit B."

Objected to as immaterial and irrelevant. Objection overruled. Copy hereto attached. Respondent excepts.

71 Counsel for relator offers in evidence another report of the committee on viaducts and railways, dated September 2, 1892 (offering the original), of which a copy is attached to the petition, marked "Exhibit C."

Objected to as immaterial and irrelevant. Objection overruled. Respondent excepts.

Counsel for relator offers in evidence original ordinance No. 3734, of which a copy is attached to the petition, marked "Exhibit D."

Objected to as immaterial and irrelevant. Objection overruled. Respondent excepts. Copy hereto attached.

Counsel for relator offers in evidence the original plan of repairs submitted by the city engineer to the board of public works, of which a blue-print copy is attached hereto, marked "Exhibit E."

Objected to as immaterial and irrelevant. Objection overruled. Respondent excepts.

Counsel for relator offers in evidence the original ordinance No. 3752, of which a copy is attached to the petition, marked "Exhibit F," the ordinance approving the plans.

Objected to as immaterial and irrelevant. Objection overruled. Respondent excepts. Copy hereto attached.

72 ANDREW ROSEWATER, sworn on behalf of the relator, examined in chief by Mr. Connell, testified as follows:

Q. State your name.

A. Andrew Rosewater.

Q. What official position, if any, do you hold in the city of Omaha?

A. City engineer.

Q. How long have you been the city engineer of the city of Omaha?

A. Thirteen years or more.

Q. During what periods of time?

—. I was city engineer in 1870, 1872, 1873, 1874. I was city engineer in 1881, 1882, 1883, 1884, 1885, 1886, and a part of 1887, and I have been city engineer during the years 1892, 1893, 1894, and this year.

Q. Are you familiar with the structure in this city known as the Eleventh-street viaduct?

A. Yes, sir.

Q. Are you familiar with Eleventh street, along which that viaduct is constructed?

A. I am.

Q. How long has that existed as a public street and a traveled thoroughfare in the locality of the viaduct?

A. That street has been dedicated to the public and opened as a street ever since the original filing of the city plat, in 1857, I believe.

Q. And prior to the construction of this viaduct what was the fact as to its being a traveled thoroughfare along that portion where the viaduct has been since constructed and in that vicinity?

73 A. It was one of the thoroughfares of the city going to the south end of the town.

Q. Do you know when that viaduct was constructed, Mr. Rosewater?

A. Yes, sir.

Q. When?

A. The viaduct was begun in 1886 and completed some time in 1887.

Q. When did you say it was completed?

A. It was completed some time in 1887.

By Mr. GREEN:

Q. Just before we became a city of the metropolitan class?

A. I think the legislation took place in the spring of 1887.

Q. And went into operation——

A. And went into operation from that time on. The viaduct was under construction during that period, but was not finished at the time of this metropolitan act.

By Mr. CONNELL:

Q. I will ask the question, Mr. Rosewater, by whom it was constructed, if you know.

A. It was constructed under a contract with the city by the Morse Bridge Company. You want to know under what arrangement it was constructed. Under a compact with the city of Omaha, the Burlington and the Union Pacific Railway Companies.

Q. Do you know by what railway companies?

Objected to as wholly irrelevant, incompetent, and immaterial.

By the COURT: The contract will show for itself.

By Mr. CONNELL:

Q. Do you know whether it was constructed over and across any railroad tracks of this defendant, The Chicago, Burlington & Quincy Railroad Company?

74 A. Yes, sir; it was.

Q. Do you know to what extent the track was ever used by that company?

A. It was the line of their main track going to Lincoln and Plattsmouth. In fact it was over the tracks that led to the west from Omaha and south.

Q. It would hardly be Plattsmouth?

A. Well, they started the other way——

Q. Do you know whether it was the through line of that company to Denver and other western points?

A. Yes, sir; it was their line to Denver, and it is their present line.

Q. State whether it is the track used by this company for its general through trains to Denver, California, and Hot Springs and other western and northwestern points.

A. Yes, sir; it is the track.

Q. Do you know of the proceedings had and taken by the city, through its council and mayor and committee, with reference to having certain repairs made on the viaduct?

A. I know.

Q. What was the condition of this viaduct immediately preceding such proceedings?

A. The viaduct was in a dangerous condition for general traffic. The timbers upon which the superficial structure rested—that is, upon which the tracks and pavement rested—were in a very decayed condition and liable to break at any time and precipitate any wagon or cars that were traveling over it down below.

Q. And what was the character of the roadway and the sidewalks as well, for pedestrians?

75 A. Well, they all rested on these same timbers, and they would have to be reconstructed or repaired in order to make them safe.

Q. What was the character of the covering and surface—for instance, the boards or planks, whatever they were—along the traveled portion for pedestrians?

A. They were not in a very good condition, although they were better than the substructure.

Q. They were in such condition as to make them need repairing?

A. They would—as soon as you took up the substructure the whole thing would have to go to pieces.

Q. What was the condition of the roadway used by teams?

A. Very dangerous.

Q. Was that viaduct closed to general travel, do you know?

A. Yes, sir; it was closed. I took the responsibility myself of having it closed and then notifying the council; then they ordered it, I believe, closed formally.

Q. Do you know whether it is wholly closed now and disused for traffic, both by teams and street cars?

A. It is closed to all traffic now.

Q. How was it closed—that is, as to physical action, by barring out traffic?

A. I think that the board of public works had some plank put across the ends of it, and a notice that the bridge was unsafe for travel stuck up there.

Q. Do you know when that was done?

A. Well, this was done last fall, I believe. I wrote a notice to the council calling their attention to the unsafe condition for even street-car traffic, which had been kept on for some time after the other traffic had been discontinued. In view of the arrangement

76 of the sill on one end of it, I considered it unsafe for street-car traffic. Their tracks going over the girders, they would be safer than wagons, where the wheels went between, and which would be precipitated below, whereas the girders was safer under the rails.

Q. When was it closed to traffic by teams—before or after the abandoning or closing of it to street cars?

A. Long before.

By Mr. GREEN: There is no controversy in regard to this here—both the answer and petition admit all that.

By Mr. CONNELL:

Q. What was the character of the covering for the purpose of wagon traffic?

A. They were plank.

Q. And what was the character of the covering along the portion assigned to pedestrians?

A. It was also plank.

Q. Where did the viaduct commence and end, or, rather, between what points did it exist?

A. You have a plat there. I can give you the exact location from that.

Q. (Handing witness plat.)

A. It substantially goes from Jackson to Mason street—that is, between the approaches. The extreme ends front on Jackson and Mason streets.

Q. That would extend a distance of about four blocks, would it?

A. Yes; four blocks exactly.

77 Q. And over what tracks—what railroad tracks would it cross?

A. It is over the tracks of the Burlington and Union Pacific Railroad Companies.

Q. Was there anything in the way of the reasonable grade crossing except the construction of railroad tracks across Eleventh street?

A. There was none. There was no crossings except directly over the tracks.

Q. As to whether the contour of ground or country in that locality was such that a grade crossing would be practicable and desirable without the use of the viaduct, but for the railroad tracks?

A. A grade crossing is a crossing on the grade of the tracks. That crossing existed at the time the viaduct was built, and was built because it was dangerous to cross on grade.

Q. Dangerous for what reason?

A. The constant moving of trains.

Q. Along the tracks?

A. Yes, sir.

Q. And without the tracks and the moving of these trains was there anything to necessitate the construction of a bridge or viaduct in that locality on that street?

By the COURT: Isn't that all concluded in the contract?

By Mr. GREEN: We don't make any controversy about that; we admit that.

The WITNESS: If there were no railroad tracks there, there would be no occasion to build a viaduct for public travel.

78 Q. The viaduct, then, isn't constructed by reason of the extreme grade?

A. No, sir.

Q. Do you know whether these repairs have been made by the railroad company or does the viaduct still remain in this dangerous condition?

A. There have been no repairs whatever since the time of the first closing of the viaduct.

Q. What do you know, if anything, of this particular company being informed or notified of the proceedings? Did you ever have any talk with Mr. Holdrege regarding it?

A. I went over the line of both the Sixteenth-street and the Eleventh-street viaduct with the chief engineers of the Union Pacific and Burlington roads, and examined those viaducts to see what, if anything, could be done or whether they were in a dangerous condition. There was no disagreement as to their being in a dangerous condition. The Sixteenth-street viaduct was first considered, and an agreement was reached as to that and repairs made. The other was not done.

Q. An agreement was reached with whom?

Objected to as incompetent, irrelevant, and immaterial. Question withdrawn.

Q. Which end of the viaduct crosses the track of the defendant in this case, The Chicago, Burlington & Quincy Railway Company?

A. The south half of the viaduct is over their track.

Q. What is the extent of what are termed the approaches to that viaduct?

A. I haven't the exact figures, but they would approximate somewhere nearly one-half of the viaduct.

79 Q. Have you a plat from which you can refresh your recollection with reference to that?

A. I think I can approximate it.

Q. If that is approximately correct your answer will do.

A. Well, I would have to scale it to get it exactly; then it would not be obtained absolutely.

Q. The approaches would approximate about one-half?

A. Yes, sir; the two approaches would approximate nearly one-half the entire length. Afterwards you reach a point which gives you nearly twenty feet clear headway over the tracks in each case before you strike the viaduct proper.

Q. Is that the necessity for the construction of the approaches?

A. You can't reach a point twenty feet above the tracks without having a construction from the beginning—a gradual approach from zero to an elevation of twenty feet above the tracks.

Q. That would be true if this track alone was to be crossed?

A. It would be true on the south end; yes; and largely on the north end. You would have to go twenty feet above the tracks before you get over the thoroughfare.

Q. Can you state approximately about what the entire length of the structure is, including the approaches?

A. About fifteen hundred feet.

Q. Then approximately about seven hundred and fifty feet would be for approaches?

A. Yes, sir; somewhere about that.

Q. Do you know whether or not this plan to which the blue-print copy is attached is the one that was prepared for making these repairs by yourself and the board of public works of the city?

80 A. Yes, sir; that plan was prepared and a copy submitted to the railway companies—each of the companies.

Q. Was there any objection ever made to it so far as the engineering part of it was concerned?

A. No question was raised by the company through their officials in any way with reference to the plans.

Q. Or as to what was required to be done with the plans?

By Mr. GREEN: Objected to as wholly immaterial. The company has objected to repair it under any plan.

A. That I understand, but they have no objection to the particular plans.

Q. They simply objected to the whole business.

A. Yes; that is true. The objection that was raised was simply an objection to the right of the city to exact of the companies to proceed with the construction or repairing at all.

By Mr. CONNELL:

Q. At which end of the viaduct, Mr. Rosewater, is the business or central portion of the city?

A. It is on the north end of the viaduct.

Q. To what extent is the country south of the south end of the viaduct inhabited and occupied?

A. O, it is inhabited and occupied for two miles at least south from that viaduct.

Q. Is Eleventh street what you would call a built-up street largely?

A. To a considerable extent. There are a large number of residents south of that viaduct.

81 Q. Do you know whether there is a great deal of business——

Objected to as immaterial.

Q. What is the character of the buildings immediately south of the viaduct, on the south side, and for what purposes are they used?

Objected to as immaterial. Objection sustained.

Q. What in your judgment as an engineer, and being familiar with the structure and the occupancy, as to whether the construction of one-third by this defendant or the repairing of one-third would be a reasonable proportion?

Objected to as incompetent, irrelevant, and immaterial. Objection sustained. Relator excepts.

Q. Now, these repairs that were proposed by the board of public works and yourself as city engineer—what was the fact as to whether they were necessary for the purpose of putting that viaduct in safe condition for travel?

Objected to as incompetent. Objection overruled. Respondent excepts.

A. Yes; I think they were necessary.

By Mr. GREEN: The point I make on it is that there is no law giving this board or city any authority to estimate what the damage would be or what the cost ought to be; but that question I can argue later on. Let this go in, subject to objection.

By Mr. CONNELL:

Q. I wish to ask you, Mr. Rosewater, the general character of these defects that exist, which made the repairs necessary; whether they were the result of failure to make ordinary repairs or whether, by reason of the time that had elapsed and the traffic over the viaduct, the parts had become weakened and rotted out or demoralized in any other way. State the facts with respect to that.

82 Objected to as incompetent, irrelevant, and immaterial. There is no controversy or no issue made in regard to that question in the pleadings. Objection overruled. Respondent excepts.

A. The reason for the city's action in this matter was owing to the general decay of the substructure under the plank—which supported the plank. It was in such a decayed condition it was dangerous to allow traffic over it any longer. It might break through at any time.

Q. Then what is the fact with reference to the covering? I refer now to the plank on the top.

Objected to as having been gone into fully. Objection sustained.

By the COURT: Does this decayed condition apply to the whole viaduct?

A. The entire viaduct.

Q. The entire length?

A. That is, but the masonry approaches. Under the masonry approaches there was no substructure. They was held with earth and supported the viaduct direct. The driveway——

Cross-examination.

By Mr. GREEN:

Q. You say these tracks are owned by the Union Pacific and Burlington Companies?

A. Yes, sir.

Q. Do you know what relation or what right the Rock Island has on these tracks?

A. I only know from general publications, that is all.

83 Q. Isn't it true that the Rock Island is operating its through trains there over it?

A. It is so reported.

Q. You know they do run trains through there?

A. Yes, sir.

Q. Isn't it so with the Milwaukee?

A. I understand they do.

Q. Isn't it also true, as a matter of general information, that they acquired an ownership to use all these tracks——

By Mr. CONNELL: I am willing to agree that, under lease with the Union Pacific, those roads are operating their trains over the tracks of the Union Pacific railroad.

By Mr. GREEN: Under a lease of nine hundred and ninety-nine years.

By Mr. CONNELL: I think that is so, too.

By the COURT: Let that fact stand admitted.

By Mr. CONNELL: I wish you would add, Which lease is in litigation and the case is now pending in the Supreme Court of the United States.

By Mr. GREEN: Having been decided both by the circuit court and the court of appeals in favor of the lease.

Q. Mr. Rosewater, what is the general topography of the land under this viaduct or between Jackson and Mason streets?

A. The ground between Jackson and Mason streets is both hollow and on an incline—that is, the traffic originally under
84 that before the viaduct was constructed went down grade to Jones or between Jones and Leavenworth and then raised up gradually towards the south.

Q. Was it a very abrupt raise after you left the Union Pacific tracks to Mason street?

A. I don't remember the exact grade; it was quite an incline.

Q. The right of way of the Union Pacific, was that right on the side of the bluff?

A. The bluff back of that ground has been cut away and streets cut down.

Q. And the approach of this viaduct is on the north side, is it not?

A. There are two approaches to this viaduct, one on the north and one on the south.

Q. How long is the approach on the south?

A. The south approach would be about three hundred feet, I would say, while the other end is perhaps between four and five hundred feet. The south end might be said to be about three hundred feet long, and the north approach is between four and five hundred feet long.

Q. Before the construction of this viaduct the tracks of the Burlington Company were close to the embankment?

A. Yes, sir; they were built on higher ground considerably than the Union Pacific.

Q. And on the north side of the tracks there is a depression, and then a rise, first a depression and a rise, to Jackson street, is there not?

A. On the north side of the Burlington tracks?

85 Q. On the north side of the Union Pacific.

A. On the north side of the Union Pacific tracks there was a gradual fall towards Jones street *is*, I believe, where the lowest point of drainage is; then there is a rise towards the south.

Q. All of this street under the viaduct north of the Union Pacific right of way is not maintained and occupied by the city, but is practically abandoned for street purposes?

A. It has not been used except on the cross-streets.

Q. So that the viaduct takes place of the street below?

A. Yes, sir.

Q. Even off the right of way?

A. That is partly and mainly so.

Redirect examination.

By Mr. CONNELL:

Q. Is not a portion of Eleventh street under the viaduct paved and used for travel down at least to a point where the railroads cross?

A. I think it was paved before the viaduct was built; that street was paved before the viaduct was built.

Q. And is it still used at the sides?

A. Slightly on the sides for local traffic.

Q. What is the width of Eleventh street at that point?

A. The full width of Eleventh street is one hundred feet, including sidewalks.

Q. What is the width of this viaduct?

A. The roadway is twenty feet, and then I believe there are six-foot sidewalks on each side.

Q. Is it constructed about in the center of the street?

A. Yes, sir.

86 Q. What is the width of the substructure where it rests upon or touches the street?

A. It is about twenty feet.

By Mr. CONNELL: It is admitted that due notice was given the defendant of these proceedings by delivering copies to the general manager.

By Mr. GREEN: I will object to that as incompetent and immaterial.

By Mr. CONNELL: That will be all right.

By Mr. GREEN: It is admitted that there has been a demand made on the company, through its general manager, and a refusal to make the repairs required in the ordinances, which have been served.

By Mr. GREEN: Respondent offers in evidence the originals of the several copies of the contracts and ordinances attached to its answer; also the ordinance (729) under which the line crossing Eleventh street was built.

Received. Contract and ordinance marked in this record for identification "Exhibits 2, 3, 4, and 5," and copies are hereto attached.

HENRY BOLLN, sworn on behalf of the relator, examined in chief by Mr. Connell, testified as follows:

Q. What official position do you hold in the city of Omaha?
A. City treasurer.
Q. How long have you been city treasurer this last term?
A. For the last three years.
87 Q. During that time have you been and are you still generally familiar with the financial condition of the city and the funds of the city?
A. Yes, sir.
Q. State whether or not there is any fund or has been during that time any fund of the city for the purpose of either constructing or making repairs to viaducts.
A. No, sir; there has not been any fund.

Objected to as incompetent and immaterial. Received subject to objection.

Q. There has been no fund that could be used lawfully for that purpose?
A. No, sir.

By Mr. CONNELL: I offer in evidence the original consent of Mr. Holdrege, as the general manager of the Omaha & Southwestern, and Mr. Kimball, as the general manager of the Union Pacific Railway Company, to the Omaha Motor Railway Company, granting the rights and privileges covered by ordinance No. 2017, marked "Exhibit 1."

Objected to as irrelevant and immaterial. Objection overruled. Respondent excepts. Copy hereto attached.

Relator rests.

By Mr. CONNELL: We admit the allegations of paragraph 11 of the defendant's answer for the purpose of this case only.

I am willing to admit the fifteenth paragraph of the defendant's answer, except that the Tenth-street viaduct is more convenient for the use of the public and will be used by the public in place
88 of the Eleventh-street, which I deny.

We admit all of paragraph 18, except the last portion of the paragraph, which relates to the danger incident to Eleventh street, and following that reference.

We admit paragraph 19.

It is admitted that the Omaha & Southwestern was incorporated in 1869 under the laws of Nebraska providing for incorporation of railroad companies, and built its line across 11th street in 1884.

By Mr. GREEN: I offer ordinance No. 729 in evidence, the ordinance under which the city gave the road the right to cross Eleventh street (Exhibit 5).

Received. Copy hereto attached.

G. W. HOLDREGE, sworn on behalf of the respondent, examined in chief by Mr. Green, testified as follows:

Q. You are the general manager of the defendant, The Chicago, Burlington & Quincy Railroad Company?
A. Yes, sir.
Q. Where does your jurisdiction lie?
A. Over the lines of the Burlington Company west of the Missouri river.
Q. What power or authority have you with respect to ordering the building of a viaduct such as is on Eleventh street, or the viaduct in dispute?

Objected to as incompetent, calling for a conclusion of the witness, and not the best evidence. Objection sustained. Respondent excepts.

89 Q. What are your duties with respect to the construction of viaducts?
A. You are referring to viaducts similar to that on Eleventh street?
Q. Yes, sir; Eleventh street.
A. I have no authority to erect an unusual structure of that kind and never had, and no officer of the company has. Authority of that kind would have to be obtained from the directors, as far as our arrangements are concerned.
Q. To what extent could you act in the premises?
A. I could look into the question and refer it to the president, who would take it to the board of directors.
Q. Has the board of directors in any way authorized you to expend any money or given any orders to you in regard to this viaduct?
A. No, sir; they never have.
Q. What instructions, if any, have you received in regard to repairing viaducts of this kind or the repairs required in this case?
A. I have received no instructions relative to this question.
Q. What authority have you to go on and make these repairs?

Objected to as immaterial, irrelevant, and incompetent, calling for a conclusion of the witness, and not the best evidence.

By the COURT: Give me the facts in relation to it.
A. The fact is I haven't the authority to spend money for the repair of the Eleventh-street viaduct.

By Mr. GREEN:

Q. Where you are required to spend a large amount of money, in expending twelve or thirteen thousand dollars, what is the usual proceeding with the company?

90 Objected to as incompetent, irrelevant, and immaterial.

Q. What is required to be obtained in order to authorize you to spend that amount of money?

By the COURT: I will hear the proof.

Relator excepts.

A. It would depend on the nature of the expenditure. As far as ordinary routine repairs are concerned, which, beyond any question, are necessary for the operation of the road, I would have authority to go on and do the work, but as far as an unusual expenditure is concerned, as this would be, I would not have the authority to do it.

Q. Supposing an order of this court would issue direct to you directing you personally to repair this viaduct, what would you have to do in order to comply with the request; what could you do by yourself in your official capacity?

Objected to as incompetent, irrelevant, and immaterial, calling for a conclusion of the witness, and not the best evidence. Objection overruled. Relator excepts.

Q. I ask you, supposing on order issued out of this court to you personally directing you to procure the repair of this viaduct, what could you do and what procedure would be necessary; what authority would you have?

Objected to as incompetent, irrelevant, and immaterial and not the best evidence. Objection overruled. Relator excepts.

A. The facts would have to be referred to our board of directors and instructions obtained from them before we could expend money in that way.

91 Q. You are acquainted with this viaduct, are you not?

A. Yes, sir.

Q. State to the court what its condition is now and how it came about.

A. The Eleventh-street viaduct is an iron or iron and steel structure, with a wooden floor. All the heavy floor beams are iron or iron and steel. The wooden floor necessarily gives out, different parts of it, at periods that might run from three to ten years, and, through neglect in repairing the wooden parts of the viaduct, it has become unsafe for use.

Q. At the time the viaduct was constructed was it contemplated by the parties that the floor would be required to be renewed once in so often?

Objected to as incompetent, irrelevant, and immaterial, not the best evidence, and calling for the conclusion of the witness. Objection overruled. Relator excepts.

A. A structure of that kind necessarily gives out, as far as the wooden parts of it are concerned, at frequent periods, and can only be kept in repair by constantly renewing the parts that give out.

Q. What is the fact about the city making repairs on this viaduct after it was first constructed?

Objected to as incompetent, irrelevant, and immaterial and call-

ing for a conclusion of the witness. Objection overruled. Relator excepts.

A. All the repairs thus far have been made by the city, and they have been made from time to time up to quite a recent date, up to the time it was closed.

Q. Has the railroad ever made any repairs there?

92 A. The railroad has not made any repairs there.

Q. How many tracks are there under this viaduct?

A. The Burlington occupies one track under the viaduct and the other railroads, the Rock Island, Milwaukee, and Union Pacific occupy twenty-one tracks.

Q. When was this lease made between the Union Pacific and the Rock Island and Milwaukee roads; about when?

A. I haven't the exact date, but it is subsequent to the construction of the viaduct, several years ago.

Q. Now, how much use relatively does the Rock Island make of those tracks as compared to the use made by your road of your track?

A. I think they use it very considerably more, for the reason that their freight business passing in and out of Nebraska passes over the tracks, as well as the passenger business. Our freight business, except that that pertains to Omaha, passes over the Platte River line, and the Rock Island freight business, going to and from the local station, the local freight station, must necessarily pass under this viaduct.

Q. What use is made of these tracks by the Union Pacific Company as compared with the use made by the Burlington?

A. They operate twenty-one tracks where we operate one, showing that there must be a much larger volumn of business pass under it and a good deal more going on, and it is used partially as a yard, requiring a number of engines and cars to pass under the viaduct, or a large number compared with ours; I should think more in proportion to the tracks, probably.

Q. How about the Milwaukee?

93 A. The Milwaukee operates the line for their South Omaha and all their Omaha business necessarily passes under, or practically all of it, for the reason that the Union Pacific side tracks, upon which the Milwaukee business is done, diverge from the main line above the viaduct; all the tracks reaching to the bottoms diverge above the viaduct.

Q. What is the fact in regard to the traffic of the Union Pacific and the handling of its trains, not only in and out of the station, but on the bottom to their shops? Does that pass and repass?

A. Business going to and from their shops and all the freight tracks and warehouses, including their freight station, must pass under the viaduct on the other tracks and on their main line. Business to and from the bridge pass- under the Eleventh-street viaduct.

Q. Where is all your eastern freight business transacted?

A. The business in and out of Omaha, as far as our local freight

station is concerned, which is a very considerable part of it, is in the bottom and does not pass under the viaduct. Our only business under the viaduct is for stations going in and out of Omaha, going west, and our freight trains from our Omaha station west and from the west to our Omaha station pertaining to Omaha business.

Q. Do you remember the contract made with the city by which your road was to contribute a certain portion of the cost of the Eleventh-street and Sixteenth-street viaducts?

A. Yes, sir.

Q. State whether the provisions of that contract have been carried out as far as the railway company is concerned.

A. Yes, sir; we have carried out the provisions of the contract on our side.

94 Q. State to the court what practical use, what substantial use, a viaduct is to the railway company in the operation of its trains on the track under it.

A. As far as our road is concerned, with one line, it is not a necessity.

Q. How is it taking all the roads together?

A. It is some convenience having the wagon track overhead.

Q. How is it with reference to all the railroads under it?

A. It is a convenience to them to have the traffic overhead. It makes less risk of accident.

Q. You had charge, I believe, of the construction of this line to South Omaha, across Eleventh street?

A. Yes, sir.

Q. Do you remember the ordinance under which it was constructed?

A. That the right of way was granted through the city, do you mean?

Q. Yes, sir.

A. I remember that we obtained an ordinance from the city wherever we crossed streets or run through streets about that time.

Q. Calling your attention to this provision of it, I will ask you if it has been complied with (referring to a book)?

Objected to as leading, immaterial, irrelevant, and calling for the conclusion of the witness.

Q. State how the line was constructed with reference to the crossings.

A. It was constructed across streets under an arrangement that we made with the city authorities, either at street grades or proper height above street grades.

95 Q. In constructing the road, did you comply with the terms of the contract between the road and the city, so far as you were to construct it, as required by the city?

Objected to as leading, incompetent, irrelevant, immaterial, and calling for a conclusion of the witness.

By the COURT:

Q. What did you do in relation to the construction of this road,

as to the construction of tracks, in accordance with the grades of the streets?

A. The tracks were made to conform with the grades of the streets, except in cases where it passed a sufficient elevation over the street to make the street entirely passable under, and in all cases under an arrangement made with the city authorities and in conformity with the contract made with the city.

By Mr. GREENE:

Q. What kind of a crossing was this at Eleventh street?

A. An overcrossing.

Q. What you call a surface crossing at grade?

A. It was an overcrossing there after the construction of the Eleventh-street viaduct.

Q. But before that, when you were building the line, when the line was first built?

A. There was no viaduct there, and it was made to conform to the grade of the street.

Cross-examination.

By Mr. CONNELL:

Q. What you mean by making the crossing conform to the streets, you mean conform to the then surface of the street?

96 A. We have to, in cases of that kind, ascertain the grade from the city authorities and put the tracks at such grade as they will designate to be the proper grade for the street.

Q. Don't you know, Mr. Holdrege, in this particular case that your track is located considerably below the established grade of the street if the street was worked to the established grade and no viaduct existed?

A. I don't know about any grade that may have been established on paper. I know about the established grade as it existed and as we were authorized by the city to lay the track by the city authorities.

Q. When you refer to the grade you refer to the surface of the ground rather than the grade established on paper?

A. I refer to the grade that was agreed on between the city authorities and railroads as the proper grade to conform with the street.

Q. The city engineer didn't lay out your line of road and fix the elevation of tracks, did he?

A. No; but we ascertained before making the location of the road what the grade of the different streets was, and we so located our road to conform to the arrangements made between the city and the roads as the proper grade.

Q. You don't pretend to know where the established grade—that is, the grade on paper—of this street was, do you?

A. No, sir; I don't know whether that differs from the grade that was designated to us by the city or not.

Q. You refer to the number of tracks other than the tracks

owned by your company. Those are all to the north of your track, Mr. Holdrege?

97 A. Yes, sir.

Q. They are all Union Pacific Railroad tracks, are they not?

A. I understand that the title is in the Union Pacific, but that they are operated under a joint lease with the two other companies mentioned, which would be equivalent to a joint ownership. It is a lease running for nine hundred and ninety-nine years.

Q. But the tracks are located on the railroad right of way, on the Union Pacific Railroad right of way, are they not?

A. They are operated by the Milwaukee and Rock Island—they are operated by all three companies, as I understand it.

Q. Three companies jointly?

A. Yes, sir.

Q. In other words, the Rock Island and Milwaukee run over the tracks that are used by the Union Pacific?

A. The arrangement——

Q. Answer that question. They run on the same tracks?

A. They all three run over the same tracks.

Q. And those tracks are tracks that were laid by the Union Pacific?

A. Yes, sir.

Q. They were constructed by the Union Pacific and on the Union Pacific right of way?

A. Or in city streets.

Q. Or cross city streets?

A. Yes, sir.

Q. They have just about as many tracks on Tenth street east of there as they have on Eleventh street, haven't they?

A. Yes, sir.

98 Q. And you have the same number on Tenth street as on Eleventh?

A. I think on Tenth we have, at the present time, two, and we have only one on Eleventh.

Q. What were the number of tracks owned and operated by the Union Pacific when this viaduct was constructed?

A. Substantially the same as at present.

Q. About twenty-one?

A. There may have been a few laid since.

Q. Substantially the same number?

A. There cannot be very much difference.

Q. Your company and the Union Pacific together not only aided in the construction of the Eleventh-street viaduct under the contract with the city, but the same two companies constructed the Tenth-street viaduct, didn't they?

A. No, sir; they didn't either one of them construct the Tenth-street viaduct?

Q. Who constructed that?

A. The Omaha Union Depot & Railroad Company constructed it.

Q. The Omaha Union Depot & Railroad Company is made up of the Union Pacific and this company, is it not?

Objected to as not proper cross-examination. Objection sustained.

Q. I would like to have the gentleman to state if it is a fact that no claim is made in this case that the defendant here is required to construct an undue proportion, if it is required to construct any.

By the COURT: I have so understood it.

99 By Mr. GREENE: I want to say now whenever I get into that case I don't think the Burlington ought to pay one-third of the construction and maintenance of any viaduct where there are two or three other railroads with twenty or twenty-one tracks under the same; that the question of proportion might yet come up in this case if all the other questions were decided in favor of the city.

By the COURT: Under that statement I will withdraw my ruling and allow you to make the proof.

By Mr. CONNELL:

Q. The Omaha Union Depot & Railroad Company is made up of the Union Pacific and this road, is it not?

By Mr. GREENE: Objected to. The Union Depot Company is a corporation organized under the laws of the State of Nebraska, and the stock made up, owned, and distributed between the companies. It is not the best proof. If they want to know what the respective contributions of the railroads were, perhaps the subscription book as to the stock might show. If the Burlington road owns one-third of the stock it would pay one-third of the assessment of stock into the Union Depot Company. The Union Depot Company built it itself.

Objection overruled. Respondent excepts.

The WITNESS: If you will allow me to ignore that question, I could explain.

By the COURT: Give the facts in relation to that.

100 A. The depot company cannot be said to be made up exactly of the Union Pacific and Burlington Companies. The Eleventh-street and Tenth-street viaducts are built under a different arrangement entirely, and the proportionate expense in one case would have nothing whatever to do with the other, for the reason that the Tenth-street viaduct was built by the Omaha Union Depot & Railway Company, and that Union Depot and Railway Company proposed to put up a large depot building and own and operate it jointly, and to rent tracks and accommodations to other railroads, and to obtain the money for this construction largely on the sale of bonds of the Omaha Union Depot & Railway Company. So the proportion that the Burlington would take of that stock, whether it would be one-third, one-half, or three-fourths, would have nothing to do, so far as any precedent is concerned, as to what we had done on Eleventh street or ought to do on Eleventh street.

By Mr. CONNELL:

Q. If I understand you, Mr. Holdrege, the cost of the construction of the Tenth-street viaduct was contributed or paid in by the Union Pacific Company and your company, was it not?

A. The Omaha——

Q. Just answer that question. Is not that true that that cost was paid in or contributed by your respective companies? Is that so or is it not? I am not asking in regard to the proportion.

A. Not, perhaps, entirely. If I would answer it directly, the fact is, the Omaha Union Depot & Railway Company, at the time they constructed that viaduct expected to have assistance from the city in aid of their entire enterprise of one hundred and fifty thousand dollars, and, after the money was in the treasury, what part of it was city money and what part was Union Pacific money——

101 Q. What I wish to know is, if it is not a fact that the cost of constructing that Tenth-street viaduct was contributed by these two companies that I have mentioned, the Union Pacific and the Chicago, Burlington & Quincy,

A. It is a fact that they owned stock.

Q. Is it not a fact that the money to do that work and buy the material was provided by those two companies? Is not that a fact? Is it or is it not?

A. No; I should not say it was. If you want an answer directly, I will tell you why: The Omaha Union Depot & Railway Company was organized, and the stock was taken by the Union Pacific and Burlington Railway Companies on an agreed proportion, and certain assistance was given by the city to that company. Then I was going to say we were going to sell bonds. This was a temporary advance by the Union Depot and Railway Company. I couldn't say that these two railroads contracted the cost of building this viaduct; the Omaha Union Depot & Railway Company spent the money, and it was expected they would sell their bonds to pay for it.

Q. What other companies besides the Union Pacific and the Chicago, Burlington & Quincy contributed to the construction of the Tenth-street viaduct?

Objected to as wholly immaterial. Objection overruled. Respondent excepts.

A. There didn't any of the companies mentioned in that question contribute money. As I stated before, it was contributed by the Omaha Union Depot & Railway Company.

Q. The cost of the Tenth-street viaduct is paid for?

102 A. I understand it is paid for by the Omaha Union Depot Company.

Q. Now, is there any other company up to this time, or was there any other company during the construction of this viaduct, interested in the depot company except the two companies I have referred to—the Union Pacific and the Chicago, Burlington & Quincy?

A. The other companies have no interest in the Union Depot Com-

pany, and at that time they didn't have these tracks with the Union Pacific.

Q. Those two companies did have the stock in it and were carrying it out together?

A. They had the stock of the Omaha Union Depot & Railway Company.

Q. What portion did the Union Pacific pay towards the cost of the Tenth-street viaduct and what proportion did the Chicago, Burlington & Quincy pay?

Objected to as immaterial. Received subject to objection. Respondent excepts.

A. As I said before, neither of them contributed directly.

Q. What proportion did they contribute to the depot company for the purpose of defraying the cost of the Tenth-street viaduct?

A. They didn't contribute to the depot company for that purpose any of it—that purpose alone.

Q. What proportion did they contribute?

A. They owned the stock in the Union Depot Company equally, half and half.

Q. You constructed together the Sixteenth-street viaduct, did you not?

A. The city constructed that, with assistance from the railroads, under the law existing at that time.

103 Q. That was between the Union Pacific and Burlington railroads?

A. It was a contract between the City of Omaha and the Union Pacific and Burlington Companies, to be built with the aid of the railroads.

Q. Under that arrangement your company was to pay one-third of the amount required to be paid by the companies and the Union Pacific was to pay the remaining two-thirds. Is not that correct?

A. That is shown in the contract?

Q. Is not that correct?

A. I don't know whether it is or not. It is in the contract.

Q. Is there any higher official than yourself connected with the Chicago, Burlington & Quincy railroad in the State of Nebraska, Mr. Holdrege?

A. No, sir.

Q. You have the general management of the entire property and the roads that are operated and are owned by that company west of the Missouri river in the State of Nebraska?

A. Yes; with such authority as is delegated to me.

Q. In these other matters, making these contracts with regard to the construction of this viaduct—I refer to the Sixteenth-street viaduct and also this Eleventh-street viaduct—you acted as the general manager of the company, did you not?

A. Yes, sir.

Q. The company never repudiated your acts, did it?

A. This contract——

Q. Just answer my question.

A. I am going to answer it. I was acting as general manager, but I didn't execute that contract under my own authority; I was authorized to do it by direct reference by the board of directors.

104 Q. I asked you whether the company in any manner ever repudiated any of your acts.

A. I had instructions from the company to sign this contract that was referred to me.

Q. Did you have any instruction to sign this paper relating to the street railway company? Wasn't that presented to you primarily and you signed it as general manager?

A. The whole question was referred to my superior officers and authorized by them.

Q. Was your authority in writing from your superior officers regarding the entering into the contract that you did enter into with the city?

A. Yes, sir; I think it was.

Q. Can you produce it?

A. I probably could find a number of letters on the subject which stated the authority.

Q. Will you produce your authority and submit it to the court?

Objected to.

By the COURT: I don't care to go into that.

By Mr. CONNELL:

Q. You have the actual control of the trains and the supervision of the tracks of this company in Nebraska, have you not, Mr. Holdrege?

A. I have charge of the operation of the road.

Q. And if an order was made by the court to discontinue the running of trains across Eleventh street for the reason that they were dangerous or a nuisance or for any other reason, you would be the officer to require that to be done, would you not, and would

105 have the power and authority to do it without any action by the board of directors or any higher officials? Isn't that so?

A. I should not feel as though I could discontinue the operations of trains on the main track, and if I was so ordered by the court I should try to operate them.

Q. You would operate them regardless of the order?

A. I should try to. If I should receive such an order as that, I should think it was unreasonable, and I would try to operate them. I have never been placed in that position.

Q. You would not wait for the orders of your superior officers in the East?

A. I have been placed here to do that.

By the COURT:

Q. If, under the law of this State, the courts of this State should issue a mandate in an action, you would have no doubt of the ability of your company to obey it, would you?

A. You mean a mandate to repair this viaduct or any mandate?

Q. A mandate in this case. If, under the law, the courts of this State should so order you, would you have any doubt of the ability of your company to obey it?

A. If I should receive such a mandate to spend such an amount of money, I should refer it to my superior officers.

Q. You have no doubt of the ability of your company to obey such a mandate?

A. When it comes to the ability of any company west of the Missouri river to pay its debts I have a great deal of doubt about it, with the way rates are going and under the present State legislation. It is a very doubtful thing whether we can increase
106 the expenditures in any way and pay our bills and make the money go round.

By Mr. CONNELL:

Q. If you had to do that to save running people down and killing citizens, you would have the power to do it, would you not?

Objected to.

(No answer.)

"EXHIBIT A."

City of Omaha, council chamber.

OMAHA, NEB., —— —, 189–.

Resolved by the city council of the city of Omaha, the mayor concurring:

That the com. on viaducts and railways and city engineer examine the roadway and road-bed of the 11th-street viaduct and report to this body if it is necessary to repave said viaduct.

Introduced by Councilman Peter E. Elsasser.

Passed July 21, 1892.

E. P. DAVIS,
President of the Council.

Attest: JOHN GROVES, *City Clerk.*

Approved:

GEO. P. BEMIS, *Mayor.*

Indorsed as follows: No. —. Resolution by Mr. Elsasser. Roadway 11th-St. viaduct. Received July 21, 1892. John Groves, city clerk. Presented to council July 21, 1892. Adopted. John Groves, city clerk.

107 "EXHIBIT B."

City of Omaha, council chamber.

OMAHA, NEB., *Aug.* 23, 1892.

Mr. President:

Your committee to which was referred a resolution instructing your committee to examine the roadway of the 11th St. viaduct and report if it be necessary to repave said viaduct have carefully examined the same and beg to report as follows:

The roadway of said viaduct is in a dangerous and shameful condition. There is scarcely a yard of pavement that is not full of holes; in fact nearly the entire pavement is rotted away; but far more dangerous is the walk for foot passengers.

We find the walk to be composed of but one thickness of plank, and these planks are warped and rotted, and if not attended to at once may be the cause of a frightful accident at any time.

We find also that the fence separating the footway from the road is broken down in many places, in some cases pieces of the fence being entirely missing.

In its present condition the Eleventh-street viaduct is a disgrace to the city, and we recommend that steps be at once taken to put it in a safe and passable condition.

SOL PRINCE,
GEO. F. MUNRO,
Committee on Viaducts & Railways.

Indorsed as follows: No. —. Report of committee on viaducts & railways. Roadway of 11th St. viaduct. Received Aug. 23, 1892. John Groves, city clerk. Presented to council Aug. 23, 1892. V. & R. and city engineer to report cost of road-bed. John Groves, city clerk.

108 "EXHIBIT C."

City of Omaha, council chamber.

OMAHA, NEB., *Sept.* 2, 1892.

Mr. President:

Your committee to which was referred communication from the city engineer relating to the Eleventh St. viaduct have carefully considered the same and respectfully report as follows:

The action of the city engineer in recommending the closing of the viaduct meets with the approval of your committee, as in our opinion the continuance of its use in its present condition would lead to serious accidents and perhaps loss of life.

Your committee, however, recognizing the hardship to which the residents of the southern part of the city are subjected by the closing of this viaduct, would most earnestly urge upon your honorable body the necessity of opening said viaduct at the earliest possible moment.

Two plans for paving the viaduct have been submitted by the city engineer, and upon his recommendation your committee would recommend the use of creosoteed wood in said paving. This is the most expensive material at present, but will prove the most economical in the end.

Your committee have left the financial question in this matter to the finance committee, who have doubtless a plan for providing the necessary funds.

Respectfully submitted.

SOL PRINCE,
GEO. P. MUNRO,
Committee on Viaducts & Railways.

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FOLDOUTS TOO LARGE TO BE FILMED

109 Indorsed as follows: No. —. Report of committee on viaducts & railways. Communication of city engineer. Received Sept. 2, 1892. John Groves, city clerk. Presented to council Sept. 2, 1892. Finance and city comptroller to look for necessary funds. John Groves, city clerk.

"EXHIBIT D."

Ordinance No. 3734.

An ordinance declaring the necessity of repairing the viaduct on and along South Eleventh street over the railroad tracks from a point near Jackson street to a point near Mason street, in the city of Omaha, and directing the board of public works to prepare plans and specifications for the repairing of said viaduct, etc.

Whereas, that the Eleventh street viaduct extending from a point near Jackson street to a point near Mason street is unsafe and is in a dangerous condition; and

Whereas it is necessary for the safety and protection of the public that said viaduct be repaired, therefore,

Be it ordained by the city council of the city of Omaha:

SECTION 1. That it is necessary and it is hereby deemed and declared necessary for the safety and protection of the public that the Eleventh-street viaduct extending along Eleventh street from a point near Jackson street to a point near Mason street in the city of Omaha be repaired by causing a new and substantial floor to be placed on and across said viaduct.

SECTION 2. For the purpose of determining the material to be used in the repairing of said viaduct and the manner and construction thereof, the board of public works of the city of Omaha are hereby ordered and directed within one week from the passage of this ordinance to prepare the plans and specifications for said repairs and to submit the same to the mayor and city council
110 for their consideration, action and approval, and the city engineer for the purpose of enabling the said board of public works to submit said plans and specifications as herein required, is hereby ordered under the direction of the board of public works to render such service to said board in preparing plans, drawings, details and specifications for the repairing of said viaduct as may be necessary for said purpose and as may be required by said board of public works.

SECTION 3. That this ordinance take effect and be in force from and after its passage.

Passed December 4th, 1893.

JOHN GROVES, *City Clerk.*
WM. F. BECHEL,
President City Council.

Approved Dec. 12th, 1893.

GEO. P. BEMIS, *Mayor.*

(Here follows diagram marked p. 111.)

112 "EXHIBIT F."

Ordinance No. 3752.

An ordinance approving the plans and specifications submitted by the board of public works for the repairing of the Eleventh-street viaduct over the railroad tracks and ordering the repairing of said viaduct to be done.

Whereas, it has been and hereby is deemed and declared necessary for the safety and protection of the public that the Eleventh-street viaduct be repaired as herein required; and

Whereas, it is right, proper and reasonable that the railroad companies owning or operating railway tracks across said Eleventh street should make said repairs to said viaduct; therefore

Be it ordained by the city council of the city of Omaha:

SECTION 1. That the plans and specifications submitted by the board of public works of the city of Omaha December 15, 1893, for the repairs of the Eleventh-street viaduct over the railroad tracks upon and across Eleventh street from a point near Jackson street to a point near Mason street in the city of Omaha, as prepared by the city engineer of said city, be and the same are hereby approved and adopted.

SECTION 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said Eleventh-street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct; and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh-
street viaduct commencing at the south end thereof, and
113 extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance.

SEC. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington & Quincy Railroad Company owning or operating railroad tracks upon and across said Eleventh street under said Eleventh-street viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs.

SEC. 3. That this ordinance shall take effect and be in force from and after its passage.

Passed Jan. 30, 1894.

W. C. WAKELEY, *City Clerk.*
EDW. E. HOWELL,
President City Council.

Approved Feb. 2nd, 1894.

GEO. P. BEMIS, *Mayor.*

114 EXHIBIT 1.

OMAHA, *April 23rd*, 1889.

To the mayor and council of the city of Omaha:

The undersigned, the companies contributing towards the construction of the viaduct on 11th street, in this city, do hereby approve the rights and privileges granted to the Omaha Motor Railway Company by an ordinance entitled "An ordinance granting the right to construct and use two tracks over the 11th-street viaduct to the Omaha Motor Railway Company, subject to certain conditions," approved April 20th, 1889, being No. 2017.

THE OMAHA & SOUTHWESTERN RAILROAD COMPANY,
By G. W. HOLDREGE, *General Manager.*
THE UNION PACIFIC RAILWAY COMPANY,
By THOS. L. KIMBALL, *General Manager.*

On the back of the above instrument appear endorsements in words and figures following, to wit:

Ap'l 23, 1889. From Omaha & Southwestern R. R. Co. and Union Pacific R. R. Co., approved of right to Motor R. R. Co. for tracks on 11 St. viaduct.

115 "EXHIBIT 2."

Viaducts—11th and 16th streets.

Articles of agreement, executed in triplicate, made and concluded this first day of February, 1886, by and between the City of Omaha party of the first part, and the Union Pacific Railway Company and the Omaha & Southwestern Railroad Company, parties of the second part, witnesseth:

That the said parties of the second part, in pursuance of the provisions of an act of the legislature of the State of Nebraska, entitled "An act to provide viaducts, bridges, and tunnels in certain cases in cities of the first class," do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not

to exceed the sum of ninety thousand dollars ($90,000), the amount so assumed and agreed to be paid, being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part, as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company, and one-fourth thereof to be paid by said Omaha & Southwestern Railroad Company.

The said parties of the second part, in pursuance of the provisions of said act, also assume and agreee to pay, as may be required by said mayor and city council, three-fifths of the entire cost of con-
116 structing a viaduct along Sixteenth street in said city over the railroad tracks of said parties of the second part, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of thirty thousand dollars ($30,000), the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part, as follows: Two-thirds thereof to be paid by said Union Pacific Railroad Company, and one-third thereof to be paid by said Omaha & Southwestern Company.

The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and damages, in the same manner and according to the same division as hereinbefore agreed.

The said parties of the second part also agree, during the present year (1886), to open Seventh street in said city through their rights of way, so as to leave a clear and unobstructed roadway fifty feet in width from curb to curb, and sidewalks ten feet in width on each side of said roadway and outside of said curbs, thereby making a total opening of seventy feet, and to build proper, substantial stone
117 retaining walls on the outside of said walks, and make sufficient and suitable provisions for lighting said walks and roadway, and thereafter, both day and night, keep said walks and roadway well and sufficiently lighted, so as to enable teams and pedestrians, at all times, to use the same, the said parties of the second part to have the right to place iron posts in line with said curbs, to support the superstructure or bridge over the same.

The said parties of the second part also agree to open Thirteenth street in said city through their rights of way, so as to leave a clear and unobstructed roadway sixty feet in width from curb to curb, and sidewalks twenty feet in width on each side of said roadway and outside of said curbs, thereby making a total opening of one hundred feet, and to build proper, substantial stone retaining walls on the outside of said sidewalks, the said parties of the second part to have the right to place iron posts in line with said curbs to support the superstructure or bridge over the same.

The said parties of the second part also agree to open Twentieth street in said city through their rights of way to the full width of said street.

In consideration of the full performance by said parties of the second part of the foregoing agreements, the City of Omaha, party of the first part, hereby agrees, by ordinance, to close the following streets across the present rights of way of said parties of the second part, to wit: Sixth street, Twelfth street, Fifteenth street.

It is also agreed that Eighteenth and Nineteenth streets in said city are to remain as at present.

It is also agreed that Fourteenth street in said city, across the present rights of way of said parties of the second part, shall remain the same as it now is until the completion of said Sixteenth-street viaduct, and then, if it shall be declared by the mayor and council that public necessity so demands, it shall be opened by said par-
118 ties of the second part in such manner as the mayor and council may require, not exceeding thirty feet in width.

In witness whereof, the said parties hereto affix their names at Omaha, Nebraska, this first day of February, 1886.

(Signed) THE CITY OF OMAHA,
By JAMES E. BOYD, *Mayor.*
UNION PACIFIC R'L'Y CO.,
By S. R. CALLAWAY, *General Manager.*
OMAHA & SOUTHWESTERN R. R. CO.,
By G. W. HOLDREGE.

In presence of—
H. KOUNTZE.

"EXHIBIT 3."

Ordinance No. 937.

An ordinance authorizing the mayor by contract to grant to the Union Pacific Railway Company and the Burlington & Missouri River Railroad Company in Nebraska certain rights and privileges, subject to certain conditions.

Be it ordained by the city council of the city of Omaha:

SECTION 1. That the mayor of the city of Omaha be, and hereby is, authorized and empowered to enter into an agreement and contract with the Union Pacific Railway Company and the Burlington & Missouri Railroad Company in Nebraska, whereby, in consideration of the said railroad companies assuming three-fifths of the cost, including damages to abutting property, of a viaduct crossing the railroad tracks of said companies on Eleventh street in said city, commencing at or near Jackson street and extending to or near Mason street, according to such plans as may be adopted by the mayor and council, the same to be constructed as soon as possible, and as soon as said mayor and council may
119 require, and complying with an act of the legislature of the State of Nebraska entitled, "An act to provide for viaducts,

bridges, and tunnels in certain cases in cities of the first class," approved March 4th, 1885, the city will close Sixth street from the north line of Pacific street to the south line of the alley between Mason and Marcy streets, and Twelfth street between blocks 201 and 202, and so much of Marcy street as lies in line of Twelfth street and is covered by right of way. The city, in consideration of the premises, is also to permit and allow said companies, at their own expense, to bridge Seventh street in said city along their respective rights of way, but in such manner as will leave a clear roadway of fifty feet from curb to curb, and a space of ten feet outside of said curb for sidewalks, and so as to allow reasonable and proper ventilation and admit sufficient light, the said companies, at their own expense, to keep the space under the portions of the bridge constructed by each respectively sufficiently lighted at all times by either natural or artificial light, and said companies are also to have the right to bridge Thirteenth street, but so as to leave a clear roadway of sixty feet from curb to curb and a space on the outside of each of said curbs of twenty feet for sidewalks, and so as to admit of ventilation and light, and are also to have the right to place iron posts for the support of said bridges over said Seventh and Thirteenth streets, on the line of said curbs.

SECTION 2. This ordinance shall take effect and be in force from and after its passage.

Approved September 8, 1895.

120 "EXHIBIT 4."

Ordinance No. 2017.

Omaha Motor Railway Company to Use Eleventh-street Viaduct.

An ordinance granting the right to construct and use two tracks over the Eleventh-street viaduct to the Omaha Motor Railway Company, subject to certain conditions.

Be it ordained by the city council of the city of Omaha:

SECTION 1. That the right to construct and use two tracks over and along the Eleventh-street viaduct, in the city of Omaha, is hereby granted to the Omaha Motor Railway Company of Omaha, subject to the following conditions, to wit:

The said Omaha Motor Railway Company shall obtain such changes as may be necessary in the roadway of said viaduct for the purpose of laying said tracks, and pay the cost thereof, as well as all costs or expense caused or made by reason of laying said tracks on said viaduct; and shall keep said tracks in good condition and pave and repave between the rails of said tracks, at its own expense, at such times and in such manner as the mayor and city council may by ordinance require.

SEC. 2. Said motor railway company, after entering upon said viaduct for the purpose of laying their tracks, shall prosecute the work with all possible speed and complete the same with-

out delay, and with the least possible inconvenience to the public use of said viaduct; and the rails to be used on said viaduct shall have wide flanges so as to accommodate the wagon travel of the viaduct; and the rails shall be kept on a level with the general roadway. Said work shall be done under the supervision and direction of the city engineer and board of public works.

121 SEC. 3. The use of said tracks by said company, and the manner and time of running cars thereon, shall at all times be subject to such reasonable rules and regulations as may be prescribed by ordinance.

SEC. 4. The tracks over and along said viaducts and the approaches and tracks leading to said viaduct to the distance of 600 feet from either end of the viaduct, may be used by such other street railway companies as the mayor and council, by ordinance, may grant the right so to do, upon such terms and conditions as may be by ordinance provided.

SEC. 5. The rights and privileges herein granted are upon the further condition that for the use of said viaduct said Omaha Motor Railway Company shall pay for the first five years a nominal rental of five ($5.00) dollars per year, and such other railway companies to whom may be granted the right to cross said viaduct shall be governed by the same condition.

The said Omaha Motor Railway Company, or other companies to whom the right may be granted, upon the expiration of said five years shall pay such reasonable annual rental to the city as may from time to time be fixed and determined by ordinance.

SEC. 6. The said Omaha Motor Railway Company shall, within six months after the passage of this ordinance, operate a double-track line of street cars across said viaduct along Eleventh street as far south as Vinton street and shall hereafter continue to operate said line in the manner herein prescribed.

SEC. 7. The rights and privileges herein granted are also subject to the approval of the railroad companies contributing towards the construction of said viaduct.

122 SEC. 8. The said Omaha Motor Railway Company shall protect the city against any claim or action for damages resulting from the use of said viaduct by said company, or which may be caused by the negligence of said company.

SEC. 9. The Omaha Motor Railway Company, to obtain any right or benefits granted, shall, within thirty days from the passage of this ordinance, file with the city clerk a written acceptance of all the provisions and conditions hereof; but such acceptance shall in no event be construed as a waiver of any existing rights conferred upon such company by its charter.

SEC. 10. The Omaha Motor Railway Company shall, at the time they accept the provisions of this ordinance, file a bond with the city in the sum of twenty thousand ($20,000) dollars for the faithful performance of the provisions of the ordinance; said bond to be signed by two sureties, subject to the approval of the mayor and city council.

If the Omaha Motor Railway Company, after it shall accept the

terms and conditions of this ordinance, shall fail to comply with the terms and conditions of this ordinance, then the Omaha Motor Railway Company shall forfeit its rights under this ordinance, whenever the mayor and council shall so determine by ordinance or concurrent resolution.

SEC. 11. That this ordinance shall take effect and be in force from and after its passage.

Approved April 20th, 1889.

Accepted by Omaha Motor Railway Company April 23, 1889.

123 "EXHIBIT 5."

No. 729.

An ordinance granting to the Omaha and South Western Railroad Company the right of way through portions of Tenth, Eleventh, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Marcy, Mason, Pacific, Williams, and George street-, and the alleys in blocks numbered two hundred twenty (220), four hundred twenty-three (423), and two hundred fifty-five (255), in the city of Omaha.

By it ordained by the city council of the city of Omaha:

Section one.

That there is hereby granted and confirmed unto the Omaha and South Western Railroad Company, the right of way, along upon, through and across Tenth street in the city of Omaha at a point between Mason and Marcy streets: thence along, upon, through and across the alley in block two hundred twenty (220) between Tenth and Eleventh streets: thence along, upon, through and across, Eleventh street at about its intersection with Marcy street: thence along upon, and through the south side of Marcy street: thence along upon and through the south side of Marcy street from about the intersection of said Marcy street with Eleventh street to the east line of Thirteenth street: thence along upon, through and across the alley in block two hundred twenty-three (223) between Thirteenth and Fourteenth streets: thence along upon, through and across Thirteenth street at a point between Marcy and Mason streets; thence along upon, through and across Fourteenth street, at a point between Marcy and Mason streets; thence along, upon through and across Mason street at a point between Four-
124 teenth and Fifteenth streets: thence along, upon through and across Fifteenth street at a point between Mason and Pacific streets: thence along, upon through and across Pacific street at a point between Fifteenth and Sixteenth streets; thence along, upon through and across the alley in block two hundred fifty-five (255) between Fifteenth and Sixteenth streets; thence along, upon through and across Pierce street at about its intersection with Sixteenth street; thence along, upon, through and across Sixteenth, Seventeenth and Eighteenth streets at points about paral-el to, and

south of the crossing of the Union Pacific railway across said Sixteenth, Seventeenth and Eighteenth streets; thence along, upon through and across Williams street at the intersection of said street with Eighteenth street; thence along, upon through and across Nineteenth street and George street at points about parallel to and south of the crossing of the Union Pacific railway across said Nineteenth street and George street, in said city of Omaha.

Section two.

Said Omaha and South Western Railroad Company shall have the right to construct, maintain and operate a line of railroad, along, upon, through and across said portions of said streets and alleys as a part of its line.

Provided, that said railroad track and tracks are constructed so as to conform to the grade of said street as near as may be, and so as to interfer- as little as possible with the travel along and upon said streets, and,

Provided, that nothing herein contained shall be construed as interfering with the right of any property-owner to recover from said company and damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize and interference with the tracks of the Union Pacific Railway Company now laid and operated by said Union Pacific Railway Company in any portions of the streets and alleys herein named and enumerated.

Section three.

This ordinance shall take effect and be in force from and after its passage.

Passed May 14th, 1884.

P. F. MURPHY,
President City Council.

Attest: J. J. Q. JWETT, *City Clerk.*

Approved May 14th, 1884.

CHAMPION S. CHASE, *Mayor.*

On the back of said ordinance appear endorsements in words and figures following, to wit: Copied. No. 729. (38.) Introduced by Councilman John F. Behm. 1st reading, 2nd reading.

I hereby certify that the foregoing is a true and complete copy of all the evidence offered or given by both parties upon the trial of the above-entitled cause.

H. B. BOYLES,
Official Stenographer, Fourth Judicial District, Nebraska, Omaha, Nebraska.

(Endorsed:) 7805. C., B. & Q. *v.* State *ex rel.* Omaha. Bill of exceptions. Supreme court of Nebraska. Filed Jun-12, 1895. D. A. Campbell, clerk.

126 And afterwards, to wit, on the 18 day of June, 1895, there was filed in the office of the clerk of said court a certain proof of service of briefs in words and figures following, to wit:

Received copy of this June 18, 1895.

C. J. GREENE,
Att'y for Pl'ff in Error.

Supreme court of Nebraska. Filed June 18, 1895. D. A. Campbell, clerk.

127 And afterwards, to wit, on the 6 day of November, 1895, the following order was made by said court and entered of record, to wit:

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA.	Error from the District Court of Douglas County. No. 7805.

On motion of the plaintiff, leave is hereby given it by the court to serve and file its briefs herein by November 20, 1895.

128 And afterwards, to wit, on the 7 day of January, 1896, there was filed in the office of the clerk of said court a certain proof of service of briefs in words and figures following, to wit:

Service of within brief accepted & 2 copies received this 15th day of December, 1895.

W. J. CORNISH,
Att'y for Defendant in Error.

Supreme court of Nebraska. Filed Jan. 7, 1896. D. A. Campbell, clerk.

129 And afterwards, to wit, on the 21 day of January, 1896, the said cause was argued and submitted, the order being as follows:

The following case was argued and submitted:

Chicago, B. & Q. R. Co. *v.* State *ex rel.* The City of Omaha. Error from Douglas county.

And afterwards, to wit, on the 18 day of March, 1896, the following judgment was rendered by said court and entered of record, to wit:

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
v.
THE STATE OF NEBRASKA *ex Rel.* THE CITY OF OMAHA, Defendant in Error.

Error from the District Court of Douglas County. No. 7805. Judgment of Affirmance.

This cause came on to be heard, was taken up, and argued by counsel; on consideration whereof the court finds there is no error apparent on the record in the proceedings and judgment of the district court. It is therefore considered by the court that the said judgment be, and the same hereby is, affirmed, and that the defendant in error recover of the plaintiff in error its costs, taxed at $—, and that a mandate issue accordingly.

And on the same day, to wit, the 18 day of March, 1896, there was filed in the office of the clerk of said court a certain opinion in words and figures following, to wit:

130 THE CHICAGO, B. & Q. R. Co.
v.
STATE *ex Rel.* CITY OF OMAHA. } No. 7805.

The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the public at large.

2. The legislature cannot under the guise of police regulations arbitrarily invade personal rights or private property. There must be some obvious and real connection between the actual provisions of such measures and their assumed purpose.

3. Due process of law, as the term is used in the State and Federal constitutions, does not necessarily imply a hearing, by one whose property is taken or damaged for public use, according to the established practice in courts of common law or equity, but is satisfied whenever an opportunity is afforded to invoke the equal protection of the law by judicial proceedings appropriate for the purpose and adequate to secure the end and object sought to be attained.

4. The power of the legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety is inherent in the sovereignty of the State and cannot be bartered by contract or otherwise.

5. Such power may be asserted directly by the legislature or may, in the absence of constitutional restrictions upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise.

131 6. The power of the legislature over private property is not absolute; but while it cannot at will impose upon property burdens so excessive and unreasonable as to work a practical confiscation thereof, the courts will never interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the law-making power of the Government respecting the wisdom or necessity of particular measures.

7. The provision of the charter of the city of Omaha (sec. 48, chap. 12*a*, Comp. Stats.) authorizing said city, by ordinance, to require railroad companies to construct and keep in repair viaducts over streets therein crossed by their tracks is a valid exercise of the police power of the State.

8. Ordinance requiring the reconstruction by two railroad companies of specific portions of a viaduct previously erected by them jointly with the city held not to violate prior contract obligations.

9. Nor is such ordinance void as against the railroad companies therein named as the owners of said roads for the failure of the city to proceed against other companies engaged in operating one or more of said tracks as lessees of the owners, the charter obligation being imposed upon railroad companies owning or operating separate lines of track.

10. The duty of railroad companies to construct or repair viaducts within the city of Omaha may be enforced by writ of mandamus.

132 POST, *C. J.*:

This was a proceeding on the relation of the City of Omaha to require The Chicago, Burlington and Quincy Railroad Company, hereafter referred to as the respondents, to repair the south one-third of the so-called Eleventh-street viaduct in said city. There was a trial upon issues joined in the district court for Douglas county, resulting in a finding and judgment in accordance with the prayer of the relator, and which has by appropriate proceedings been removed into this court for review.

It is essential to a perfect understanding of the questions discussed to refer in detail to the legislation of the State and the city, so far as it relates to the subject of the controversy, and in so doing we will follow the order in which they are presented in the valuable brief submitted in behalf of the respondent.

In the year 1869 the Omaha and Southwestern Railroad Company was organized under the general statutes of this State, and immediately thereafter constructed a line of road from the city of Omaha in a southwesterly direction to a point on the Platte river in Sarpy county, and which it continued to operate until the year 1871, when it transferred all of its property and franchises to the Burlington and Missouri River Railroad Company, also a Nebraska corporation, by lease for 999 years. Said road was by the last-named company operated until 1880, in which year it was, together with all the property and franchises of the original corporation, transferred to the respondent company, a corporation of the State of Illinois. Sec. 83, chap. 25, Rev. Stats. 1866, under which the Omaha and Southwestern Company was organized, contained, among other provisions, the following:

133 "SEC. 83. If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley or public way or ground of any kind or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authority owning or having charge thereof and the rail-

road company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied."

In the year 1884 application was by the last-named company made to the city for permission to lay its tracks over and across certain streets therein, including Eleventh street; and in response to that request an ordinance, No. 729, was enacted and approved in the following language:

"Said Omaha & Southwestern Railroad Company shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portion of said streets and alleys as a part of its line; provided that said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may be, and so as to interfere as little as possible with the travel along and upon said streets; and provided, that nothing herein contained shall be construed as interfering with the right of any property-owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company in any portion of the streets and alleys herein named and enumerated."

134 Pursuant to said ordinance the respondent soon thereafter constructed a track from Tenth street across Eleventh street and thence in a southwesterly direction to the city limits. Long previous to the last-mentioned date the Union Pacific Railroad Company had, with the consent of the city, constructed twenty-one or more tracks across Eleventh street, which have ever since been in continual operation for general traffic and for switching purposes, so that the additional tracks therein of the respondent did not materially increase the inconvenience or danger of the public in the use of said street.

By sections 1, 2, and 4 of an act entitled "An act to provide for viaducts, bridges, and tunnels in certain cases in cities of the first class," approved March 4, 1885 (Session Laws 1885, p. 109*m*, chap. 12), it was declared:

"SECTION 1. That the mayor and city council in any city of the first class shall have power, whenever they deem any improvement, herein provided for, necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct or bridge over, or tunnel under any railroad track or tracks, switch or switches in such cities, when such track or switches cross or occupy any street, alley or highway thereof, in the manner and to the extent hereinafter provided.

SEC. 2. Whenever any such viaduct, bridge or tunnel shall be deemed necessary, as provided in the preceding section, the mayor and city council shall have the power to secure and adopt plans and specifications therefor, together with the estimated cost of the work, and thereupon, if the railroad company or companies, across whose tracks or switches the work is proposed to be built, will assume three-fifths ($\frac{3}{5}$) of the entire cost thereof, and

135 three-fifths ($\frac{3}{5}$) of all damages to abutting property on account

of construction of said viaduct, bridge or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require, and when the payment of the further sum of one-fifth ($\frac{1}{5}$) of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donation or by execution of good and sufficient bond as will protect said city from the payment of said one-fifth ($\frac{1}{5}$) then the said mayor and council may proceed to contract with the necessary party or parties for the construction of such viaduct, bridge or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one-fifth ($\frac{1}{5}$) of the cost thereof by the city, by special tax on all taxable property in such city, and one-fifth ($\frac{1}{5}$) by special tax to property benefitted, as provided in the following section, if not otherwise provided for.

SEC. 4. The city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge or tunnel as herein provided, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street railway company. And the compensation paid for such use shall be set apart and used towards the maintenance of such viaduct, bridge or tunnel."

136 In virtue of the foregoing provisions the city, the Union Pacific Company, and the respondent in the year 1886 entered into an agreement in writing, the essential part of which is as follows:

"* * * witnesseth: That the said parties of the second part in pursuance of the provisions of an act of the legislature of the State of Nebraska, entitled, 'An act to provide for viaducts, bridges and tunnels in certain cases in cities of the first class,' do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street in said city over the railroad tracks of said parties of the second part, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars ($90,000), the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company and one-fourth thereof to be paid by said Omaha & Southwestern Railroad Company. * * *

The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase

the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and damages, in the same manner and according to the same division as hereinbefore
137 agreed." * * *

Pursuant to that agreement, the viaduct in question was constructed and dedicated to the use of the public early in the year 1887.

In the year last named a new charter was provided for the city by an act entitled "An act incorporating metropolitan cities and defining and prescribing their duties, powers, and government" (Session Laws 1887, p. 105, ch. 10), section 48 of which, as amended in 1893, reads as follows:

"SEC. 48. The mayor and council shall have power to require any railway company or companies owning or operating any railway track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. * * * When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, reconstruct, or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, reconstruct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse
138 to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars ($100) and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceedings to erect, construct, reconstruct or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power whenever any railroad company or companies shall fail, neglect or refuse to erect, construct, reconstruct or repair any viaduct or viaducts after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the costs of the erection, construction, reconstruction or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, reconstruct or repair the same, and such cost shall be a valid and subsisting lien against such property and shall also be a legal indebtedness of said company or companies in favor

of such city, and may be enforced and collected by suit in the proper court." (Session Laws 1893, p. 70, ch. 3, sec. 7.)

In the month of January, 1894, the relator having determined from the report of the city engineer, the board of public works, and other competent evidence that extensive repairs were required upon said viaduct by reason of structural weakness thereof and other causes, enacted an ordinance approving the plans and specifications therefor previously submitted by the city engineer, sections 2 and 3 of which reads as follows:

139 "SEC. 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said Eleventh-street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Burlington & Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh-street viaduct commencing at the south end thereof, and extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance."

"SEC. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago Burlington & Quincy Railroad Company owning or operating railroad tracks upon and across said Eleventh street under said Eleventh-street viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs."

Notice of the foregoing order was in due form served upon the respondent as well as upon the Union Pacific Railroad Company, and upon the refusal of the former to comply with the terms of the ordinance this proceeding was instituted with the result stated.

140 The first proposition asserted by the respondent is that sec. 48, above set out, has a prospective operation only and does not in terms or by implication apply to viaducts in existence at the time it took effect. We are, however, unable to accept counsel's definition of a retrospective law. A statute does not operate retroactively from the mere fact that it relates to antecedent events. A retrospective law has been defined as one intended to affect transactions which occurred, or rights which accrued, before it became operative as such, and which ascribes to them effects not inherent in their nature in view of the law in force at the time of their occurrence. Bishop, Written Laws, sec. 83; Black, Interpretation of Laws, p. 247.

The language employed in the statute is any viaduct or viaducts,

and must, when read in the light of the authorities cited, be held to include such as were then in existence as well as those subsequently constructed.

The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. It is one of the powers which has been reserved by the people of the State, and which cannot be surrendered, to require persons and corporations to so exercise and enjoy their rights as not, unnecessarily, to injure others. That the principle stated is especially applicable to existing rights, without regard to the time of their acquirement or to the source from whence they are derived, appears to us a self-evident proposition not requiring argument, and the subject will not hereafter be further pursued in this connection.

141 The next and most important subject of inquiry is presented by respondent's contention that the ordinance under which the city proceeded in ordering the repairs in question contemplates the taking of its property without due process of law within the meaning of the State and Federal constitutions, and also impairs the obligation of the contract under which its track was laid and under which said viaduct was constructed.

The difficulty attending a solution of the questions presented by this assignment is augmented from the fact that courts have not always observed the distinction between the different reserved powers of the State and have cited indiscriminately cases involving the police power, the taxing power, and the power of eminent domain. Nor is the confusion on that account at all strange when we remember that those powers all depend for their vitality upon a common principle, viz., the subordination of private rights to the public welfare of the individual to the community. Of the cases frequently cited to illustrate that principle many involve an application of two or more of the powers enumerated, while in others the line of distinction is by no means clearly apparent. Many attempts at defining the police power have been made, but in none has the limit of its exercise been defined with precision. It is, in the language of Chief Justice Shaw in Commonwealth *v.* Alger, 7 Cush. (Mass.), 53, "much easier to perceive and realize the existence and sources of this power than to mark its boundaries or prescribe limits to its exercise." Doubtless the safe course to pursue in attaining the desired result is that which is characterized by Mr. Justice Miller in Davidson *v.* City of New Orleans, 96 U. S., 97, as

142 "the gradual process of judicial inclusion and exclusion."

We held in Smiley *v.* McDonald, 42 Neb., 5, that the legislature cannot under the guise of a police regulation arbitrarily invade private property or personal rights, but that the court must be able to perceive some clear and real connection between the assumed purpose of the law and its actual provisions. The obvious purpose of the legislation in this case, both State and municipal, is to promote the convenience and safety of the public at a grade crossing which is judicially recognized as a place of danger. It is, in short, the exercise of the governmental power and duty to secure a safe

and necessary highway, and must be upheld, if at all, as a legitimate exercise of the police power of the State. The authorities which fully sustain this proposition will be noticed in the course of our further examination of this case and need not be here cited.

The questions presented by this assignment are in principle nearly allied, covering substantially the same field of inquiry, and will, for convenience, be considered together.

The proceeding by the mayor and council is, it is claimed, essentially judicial in character, and, to use the language of the respondent, "such proceeding without notice to those concerned and without giving them an opportunity to be heard violates every maxim and principle of constitutional government."

The term due process of law is, like the police power of the State, not susceptible of a precise definition. However, that of Judge Cooley appears to have proved the most acceptable to the courts of this country, viz: "Due process of law in each particular case means an exertion of the powers of government as the settled maxims of the law permit and sanction and under such safeguards for the protection of individual rights as these maxims prescribe
143 for the class of cases to which the one in question belongs."

In Board of Directors *v.* Collins, 46 Neb., 411, we held, in effect, that the constitutional requirement with respect to that subject does not imply a hearing according to the established practice in courts of common law or equity, but that it is satisfied whenever the citizen whose property is taken or damaged for public use is afforded an adequate remedy therefor in a court of competent jurisdiction.

And the doctrine is now firmly established, although after some diversity of opinion, that previous notice and an opportunity to be heard by persons thereby affected is not indespensible to a valid exercise of the police power or the power to levy and collect taxes, whether ad valorem, by the ordinary means, or such as are denominated special assessments and chargeable against particular property.

In McMillen *v.* Anderson, 95 U. S., 37, Mr. Justice Miller, in holding that the courts of the United States could not be invoked to prevent the collection of an alleged illegal license tax levied by the State of Louisiana, on the ground that the effect thereof was to take the petitioner's property without due process of law, said: "It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present or had an opportunity to be present in some tribunal when it was assessed; but this is not and has never been considered necessary to the validity of a tax. * * * Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that State, as in others, if compelled to pay the tax by a levy upon
144 his property, he can sue the proper party and recover back the money as paid under duress, if the tax was illegal."

True, it was said in Barker *v.* City of Omaha, 16 Neb., 269, that "notice in some form must be given a property-owner before a special assessment upon his property becomes fixed and irrevo-

*k*able;" but the learned author of that opinion did not say or imply that the means of redress afforded in other cases against illegal assessment fails to satisfy the constitutional inhibition against the taking of property without due process of law. What is meant, and what is the doctrine of the authorities there cited, is that a property-owner shall, before being required to pay, have an opportunity to be heard in the courts in a proceeding instituted by himself or by the municipality to which the taxing power of the State has been by law entrusted. Although there are many cases in the State and Federal courts in harmony with the opinion of Justice Miller from which the foregoing is quoted and fully sustaining the proposition here asserted, we prefer to confine our examination of such as involve an exercise of the police power rather than the power of taxation.

In Woodruff *v.* Catlin, 54 Conn., 295, it is said: "The legislature, having determined that the intersection of two railways in a highway in the city of Hartford at grade is a nuisance, dangerous to life, in the absence on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersections; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part
145 by both; * * * and it has the power to do all this for the specified purpose and to do it through the instrumentality of a commission" appointed for the purpose. Appeal of New York & N. E. R. Co., 58 Conn., 532, involved the constitutionality of an act of the legislature limiting the amount chargable to a town or village, on the separation of the grade of a highway from that of a railway track situated therein, to one-fourth of whole cost of such improvement. Such a limitation, it was argued, authorized the taking of the appellant's property without due process of law, inasmuch as it prevented the commissioner to whom the discretion was entrusted from apportioning to the city a just and equitable share of the burden imposed by the act. But the court held otherwise. Carpenter, J., speaking for the court, after remarking that the policy of the law was to abolish grade crossings, said: "Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal, or that either may be required to pay the whole, and if each contributes that the proportion which each shall pay may be determined by the legislature in each case as it arises or by general rule by itself or by a delegation of its power to the railroad commissioners. This exercise of power is justifiable on the ground that Government itself in the discharge of its governmental duties undertakes to remove the danger, and does it in the same manner and through the same instrumentalities that it provides and maintains highways through and at the expense of the towns and other corporations. So far as towns are concerned,

it is a duty that has ever devolved upon them to keep the
146 highways reasonably safe. They are compelled to act without compensation or pecuniary profit. Their sole motive is the public welfare. Railroad companies in some sense are but the agents of the Government in affording to the public a more expeditious and vastly improved method of travel. * * * Unlike towns, they do not act upon compulsion, but by choice. Their motive is private gain. Public benefit is incidental. * * * They contribute largely to the danger, and the State may well require them to contribute largely to its removal, * * * requiring the railroad company to pay three-fourths of the expense. However just it might be to require the town to pay more than one-fourth is not a matter of which the railroad company can legally complain."

That doctrine was reasserted by the same court in appeal of New York & N. E. R. Co., 62 Conn., 527, which was, upon proceedings in error to the Supreme Court of the United States, affirmed and the validity of the act in question expressly upheld. See 151 U. S., 556. In the opinion last referred to this language was used by Chief Justice Fuller: "Nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them (railway companies), in particular instances, of the entire expense of the performance of acts required in the public interest in the exercise of legislative discretion, nor are they thereby deprived of property without due process of law by statutes under which the result is ascertained in a mode suited to the nature of the case and not merely arbitrary and capricious, and that the adjudication of the highest court of a State, that in such particulars a law enacted in the exercise of the police power of the State is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States." And sub-
147 stantially similar views are expressed by that court in Missouri P. R. Co. *v.* Humes, 115 U. S., 512, and Eldridge *v.* Frezevant, 16 Sup. Ct. Rep., 345.

In Train *v.* Boston Disinfecting Co., 144 Mass., 529, a regulation of the board of health for the disinfecting of certain vessels and goods imported therein at the owners' expense was assailed on the ground that no provision was by law made for a hearing or for review by appeal or otherwise; but the court pronounced the regulation a reasonable one and defensible as an exercise of the police power of the State.

In Commonwealth *v.* Roberts, 155 Mass., 281, an act required all buildings used for a designated purpose to be supplied with sufficient water-closet connections. It was held, although there was no provision for notice or hearing, that said act was a valid exercise of the police power and applicable to buildings erected before its enactment, as well as to those subsequently constructed.

In People *v.* Boston & A. R. Co., 70 N. Y., 569, the appellant company was required to construct a bridge over a turnpike road on the ground that the State may, under the powers reserved to the

legislature, impose upon railroad corporations such additional burdens as are essential to the public welfare.

In State *v.* Missouri P. R. Co., 33 Kan., 176, the power of the city of Atchison to compel the respondents to construct viaducts was sustained under legislation substantially like that here involved. Referring to the subject of notice, the court, by Valentine, J., observed: "We might, however, say that we do not think it is necessary that the city should have given the railroad company notice before passing the ordinance requiring them (respondents) to construct the viaduct. Notice afterward, with an opportunity on the
148 part of the railroad companies to contest the validity of the ordinance and the right of the city to compel them to construct the viaduct, is sufficient." But the clearest and most satisfactory exposition of the subject is found in Health Department *v.* Rector of Trinity Church, 145 N. Y., 32, which was an action to recover a penalty under a statute requiring all tenement-houses to be supplied with water on each floor occupied or intended to be occupied by one or more families whenever so directed by the board of health. The statute made no provision for notice to property-owners, and none was in fact given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board. In the opinion of Peckham, J., it is said: "The legislature has power, and has exercised it in countless instances, to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in any particular case. * * * The fact that the legislature has chosen to delegate a certain portion of its power to the board of health * * * would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order."

And, in answer to the argument that the effect of the act was to impair contract obligations, the same learned judge said: "Laws and regulations of a police nature, although they may disturbe the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply
149 regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure." See also 1 Dillon, Municipal Corporations (4 ed.), sec. 141 and note; Commonwealth *v.* Alger, 7 Cush. (Mass.), 83; Baker *v.* City of Boston, 12 Pick. (Mass.), 183; Thorpe *v.* Rutland & B. R. Co., 27 Vt., 140; Tiedeman, Limitations of Police Power, sec. 124; Prentice, Police Power, pp. 57, 58.

And the principle which underlies all of the cases cited was distinctly recognized by this court in State *v.* Chicago, B. & Q. R. Co., 29 Neb., 412. It will not, of course, be contended that the power of the legislature is in that respect absolute, or that it may at will impose upon property burdens so unreasonable as to work a practi-

cal confiscation. There is, as all admit, a limit beyond which it cannot go and within which it will be confined by the judicial power of the State. Prentice, Police Power, p. 31; Minnesota v. Barber, 136 U. S., 313. But it is unnecessary, if it were possible, to point out the boundary line between reasonable and unreasonable exactions. It is enough that the courts will not interfere to prevent the enforcement of statutes on account of any mere difference of opinion between them and the law-making branch of the Government respecting the wisdom or necessity of particular measures.

To summarize briefly, we conclude from the foregoing authorities and many others examined that the legislation assailed in
150 this cause is a valid exercise of the police power of the State over the subject to which it applies; that it does not authorize the appropriation of the respondent's property without due process of law in a constitutional sense, since the latter is unable to invoke the equal protection of the law by any appropriate proceeding, and because it did in fact put in issue by the answer both the validity of the ordinance and the reasonableness of the amount apportioned to it for the repair of the viaduct in question; nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise. Such power is inherent in the sovereignty of the State, and may be asserted directly by the legislature, or may, in the absence of constitutional restriction upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. The single purpose of the legislation, whether contemplating the erection or reconstruction of the viaduct, is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible, and it is not unreasonable to require the parties to maintain the street in a condition of safety, for whose benefit and convenience it was originally rendered unsafe.

The argument assailing the ordinance on the ground that it requires the respondent to repair the south one-third of the viaduct, instead of contributing a designated part of the entire cost, is, we think, without merit. Section 48, above set out, confers upon the mayor and council of the city plenary powers with respect to
151 the subject. They may by ordinance determine the proportion of the viaduct and approaches to be constructed by two or more railroad companies owning or operating separate lines of track to be crossed thereby, or may determine the cost thereof to be borne by each. The ordinance, if not within the letter of the city's charter, is clearly within its declared scope and purpose; but in the absence of any statute regulating the manner of apportioning the cost of such repairs, it cannot be said that the plan adopted is either so inequitable or unreasonable as to amount to an abuse of the discretion conferred upon the officers of the city. Equally groundless is the contention that the city was required to proceed against the Chicago, Rock Island and Pacific and the Chicago, Milwaukee and St. Paul Railroad Companies, then engaged in operating, jointly

with the Union Pacific Company, certain tracks belonging to the latter across Eleventh street and under said viaduct. The statute, as we have seen, authorizes the city to require two or more railroad companies owning or operating separate lines of track to erect, construct, reconstruct, or repair viaducts. If we admit the companies named as lessees of the Union Pacific Company to be within the terms of the act it does not follow that they are in any sense necessary parties to the proceeding, since the city might still have proceeded against the owners of the tracks operated by them. Such is the plain and necessary inference from the language of the statute.

Lastly it is argued that, conceding the respondents' duty to repair the viaduct as commanded by the ordinance, such duty is not one which will be enforced by means of the writ of mandamus. By reference to section 48 of the city's charter it will be observed that
authority to proceed by mandamus or other appropriate pro-
152 ceedings is therein expressly conferred; but independent of that provision, mandamus has long been recognized as an appropriate remedy, if not the only adequate remedy, in cases of like character. Indeed, so firmly is that rule established by the decisions of this court as not to admit of a doubt at this time. See State *v.* Republican V. R. Co., 17 Neb., 647; S. C., 18 Neb., 512; State *v.* Grand Island & W. C. R. Co., 27 Neb., 694; State *v.* Chicago, B. & Q. R. Co., 29 Neb., 412.

We discover no error in the record, and the judgment of the district court is affirmed.

Affirmed.

153 And afterwards, to wit, on the 7th day of May, 1896, there was filed in the office of the clerk of said supreme court of Nebraska the following petition for writ of error and allowance of same:

154 UNITED STATES OF AMERICA:

To the Honorable David J. Brewer, one of the associate justices of the Supreme Court of the United States:

The Chicago, Burlington & Quincy Railroad Company respectfully shows—

That on the 18th day of March, 1896, the supreme court of the State of Nebraska rendered a judgment against your petitioner in a certain cause therein pending, entitled The Chicago, Burlington & Quincy Railroad Company, plaintiff in error, *vs.* The State of Nebraska *ex relatione* The City of Omaha, defendant in error, affirming the judgment of the district court of Douglas county, Nebraska, in an action or suit brought by the State of Nebraska *ex relatione* The City of Omaha, as relator, against the Chicago, Burlington & Quincy Railroad Company, which judgment directed the issuance of a peremptory writ of mandamus requiring respondent to make certain repairs of the value of above $13,000 upon a specified, arbitrarily determined portion of a viaduct on Eleventh street, in said city,

across the track owned and operated by your petitioner and some twenty or twenty-one additional tracks operated by the Union Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company, to wit, the whole of one-third of its entire length, beginning at the south end thereof.

Your petitioner further states and claims that the record herewith submitted shows that the track of the plaintiff in error across
155 Eleventh street, in the city of Omaha, under the viaduct thereon was located and constructe l under a contract, the obligation of which is impaired by imposing upon the plaintiff in error the burden of repairing said viaduct; and, further, that said viaduct on Eleventh street, in said city of Omaha, over the track of the plaintiff in error was constructed under a contract made and entered into by authority of law by which the said city of Omaha became obligated to maintain it.

Your petitioner claims the right to remove the said judgment and proceedings to the Supreme Court of the United States by writ of error, under section 709 of the Revised Statutes, because the cause of action set forth in the said petition of the said State of Nebraska on the relation of the said city of Omaha against your petitioner, and upon which the aforesaid judgment was rendered by the district court of Douglas county, Nebraska, and affirmed by the supreme court of Nebraska, was based solely on section 48, chapter 10, Laws of Nebraska, 1887, entitled "An act incorporating metropolitan cities and defining, regulating, and prescribing their duties, powers, and government," approved March 30, 1887, as amended in 1893, and constituting section 7 of an act known as chapter 3, Laws of Nebraska, 1893, entitled "An act entitled An act to amend section 48 of an act entitled 'An act incorporating metropolitan cities and defining, regulating, and prescribing their duties, powers, and government,' approved March 30, 1887, or as subsequently amended, and to repeal said section as heretofore existing," and an ordinance No. 3752 of the city of Omaha, passed by the city council of the city of Omaha on January 30, 1894, in the exercise of
156 authority conferred by the State of Nebraska, all of which appears by record of the proceedings in said cause, duly certified, which is herewith submitted.

Your petitioner states and claims that the said statute of the State of Nebraska and the said ordinance of the said city of Omaha, Nebraska, so, as aforesaid, passed in the exercise of authority conferred by the said State of Nebraska, are in conflict with those portions of the Constitution of the United States known as section 10, article 1, thereof, and the 5th and 14th amendments thereto, and that the said statute of the State of Nebraska and the said ordinance of the city of Omaha, Nebraska, passed under the authority aforesaid, and the said judgment of the supreme court of the State of Nebraska deprive your petitioner of its rights, liberties, and property without due process of law; deny to your petitioner the equal protection of the laws; impair the obligations of the contracts between the city of Omaha and your petitioner; take the private property of your

petitioner for private use without due process of law, and for public use without just compensation.

Your petitioner states that the supreme court of the State of Nebraska is the highest court of law and equity in said State of Nebraska in which a decision can be had in the aforesaid hereinmentioned suit or action.

Wherefore your petitioner prays the allowance of a writ of error returnable in the Supreme Court of the United States, and for a citation, and that, on the execution of the proper supersedeas bond herein, the said judgment pending the said writ of error may be stayed and superseded.

And your petitioner will ever pray.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Petitioner*,
By RALPH W. BRECKENRIDGE,
Attorney for said Petitioner.

157 Let writ of error issue upon petitioner, Chicago, Burlington & Quincy Railroad Company, entering into a bond to the State of Nebraska *ex rel.* City of Omaha in the sum of $25,000, conditioned as by law in such case made and provided.

Washington, D. C., May 1, 1896.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

158 [Endorsed:] 7805. The Chicago, Burlington & Quincy Railroad Company *v.* State of Nebraska *ex rel.* City of Omaha. Petition for writ of error and allowance of same. Supreme court of Nebraska. Filed May 7, 1896. D. A. Campbell, clerk.

159 And also, on the same day, to wit, the 7th day of May, 1896, there was filed in the office of said clerk a certain bond in words and figures as follows, to wit:

160 Know all men by these presents that we, the Chicago, Burlington & Quincy Railroad Company, as principal, and H. W. Yates, as surety, are held and firmly bound unto the State of Nebraska on the relation of the City of Omaha in the sum of $25,000, to be paid to the said State of Nebraska on the relation of the City of Omaha; to which payment, well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of April, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at a term of the supreme court of the State of Nebraska, in a suit pending in said court between The Chicago, Burlington & Quincy Railroad Company, plaintiff in error, *v.* The State of Nebraska *ex relatione* The City of Omaha, a judgment was rendered against the said Chicago, Burlington & Quincy Railroad Company, and the said Chicago, Burlington & Quincy Railroad Company has obtained a writ of error and filed a copy in the clerk's

office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Nebraska on the relation of the said City of Omaha, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from date:

Now, the condition of the above obligation is such that if the said Chicago, Burlington & Quincy Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

161 By RALPH W. BRECKENRIDGE,
Its Attorney.

HENRY W. YATES.

STATE OF NEBRASKA, } ss:
Douglas County, }

H. W. Yates, being duly sworn, says he is the surety who signed the above and foregoing bond, and that he is worth the sum of $25,000 over and above all his just debts, obligations, and exemptions.

H. W. YATES.

Subscribed in my presence and sworn to before me this 25th day of April, 1896.

A. D. TOUZALIN,
Notary Public.

[SEAL.]

I approve the foregoing bond as supersedeas.

DAVID J. BREWER,
Associate Justice of the United States Supreme Court.

May 1st, 1896.

(Endorsed:) 7805. The Chicago, Burlington & Quincy Railroad Company *v.* The State of Nebraska *ex rel.* The City of Omaha. Bond. Supreme court of Nebraska. Filed May 7, 1896. D. A. Campbell, clerk.

162 And on the same day, to wit, the 7th day of May, 1896, there was filed in the office of the said clerk the following writ of error:

163 UNITED STATES OF AMERICA, ss:

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the

said State in which a decision could be had in the said suit between The Chicago, Burlington & Quincy Railroad Company, plaintiff in error, and The State of Nebraska *ex rel.* The City of Omaha, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
164 statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 1st day of May, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

165 [Endorsed:] 7805. The Chicago, Burlington & Quincy Railroad Company *v.* The State of Nebraska *ex rel.* The City of Omaha. Supreme court of Nebraska. Filed May 7, 1896. D. A. Campbell, clerk.

THE SUPREME COURT OF NEBRASKA, *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled cause, together with all things concerning the same, to wit: The original petition for allowance of writ of error and allowance of same, the original writ of error, original citation, with proof of service; original assignment of errors, and copy of bond. Copies of the writ of error and citation have been lodged and remain in my office.

Seal Supreme Court of Nebraska.

In testimony whereof I hereunto subscribe my name and cause to be affixed the seal of said court this 7th day of May, A. D. 1896.

D. A. CAMPBELL, *Clerk.*

166 And on the same day, to wit, the 7th day of May, 1896, there was filed in said clerk's office the following citation and proof of service of same:

167 UNITED STATES OF AMERICA, *ss:*

To The State of Nebraska *ex rel.* The City of Omaha, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Nebraska, wherein The Chicago, Burlington & Quincy Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 1st day of May, in the year of our Lord one thousand eight hundred and ninety-six.

DAVID J. BREWER,

Associate Justice of the Supreme Court of the United States.

168 [Endorsed:] 7805. The Chicago, Burlington & Quincy Railroad Company *v.* The State of Nebraska *ex rel.* The City of Omaha. Citation. Supreme court of Nebraska. Filed May 7, 1896. D. A. Campbell, clerk.

On this sixth day of May, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared James E. Kelby before me, the subscriber, James Hodge, notary public within and for the county of Douglas, State of Nebraska, and makes oath that he delivered a true copy of the within citation to the defendant in error named therein, to wit, The City of Omaha, by delivering the same to W. J. Broatch, mayor, and W. J. Connell, its attorney and attorney for defendant in error.

Sworn to and subscribed the 6th day of May, A. D. 1896.

{ Notarial Seal of J. Hodge, Douglas County, Nebraska. Commission Expires Mar. 8, 1898. }

JAMES HODGE,

Notary Public for Douglas County, Neb.

Rec'd copy 5, 5, '96.

W. J. CONNELL, *City Att'y.*

Rec'd copy 5, 6, '96.

W. J. BROATCH,

Mayor City of Omaha, Neb.

169 And on the same day, to wit, the 7th day of May, 1896, there was filed in said clerk's office the following assignment of errors:

170 In the Supreme Court of the United States, October Term, 1896.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, Plaintiff in Error,
vs.
STATE OF NEBRASKA *ex Rel.* CITY OF OMAHA, Defendant in Error.
} Assignment of Errors.

And now comes the said plaintiff in error and says that in the record and proceedings of the supreme court of the State of Nebraska in the above-entitled cause there is manifest error, in this, to wit:

1. The supreme court of Nebraska erred in making the decree or judgment rendered in this suit and in affirming the erroneous judgment therein of the district court of Douglas county, Nebraska.

2. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the Constitution of the United States.

3. The decree or judgment is erroneous in that by adjudg-
171 ing the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the State of Nebraska, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the Constitution of the United States.

4. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the Constitution of the United States.

5. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the State of Nebraska, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the provision of the Constitution of the United States.

6. The decree or judgment is erroneous in that it deprives the

Chicago, Burlington & Quincy Railroad Company of its property and confers it upon other persons for a private use, contrary to the Constitution of the United States.

7. The decree or judgment is erroneous in that it deprives the Chicago, Burlington & Quincy Railroad Company of its
172 property without making just compensation therefor, contrary to the Constitution of the United States and in abridgement of the privileges and immunities of the Chicago, Burlington & Quincy Railroad Company, thus denying to it the equal protection of the law.

8. The decree or judgment is erroneous in that it deprives the Chicago, Burlington & Quincy Railroad Company of its property without due process of law, contrary to the Constitution of the United States.

And the said Chicago, Burlington & Quincy Railroad Company prays that the judgment aforesaid may be reversed and annulled, and that it may be restored to all things which it hath lost by occasion of the said judgment.

RALPH W. BRECKENRIDGE,
Attorney for Plaintiff in Error, Chicago, Burlington & Quincy Railroad Company.

173 [Endorsed:] 7805. In United States Supreme Court. Chicago, Burlington & Quincy Railroad Company *vs.* State of Nebraska *ex rel.* City of Omaha. Assignment of errors. Supreme court of Nebraska. Filed May 7, 1896. D. A. Campbell, clerk.

174 THE STATE OF NEBRASKA, *ss:*

I, D. A. Campbell, clerk of the supreme court of the State of Nebraska, do hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings in the case of The Chicago, Burlington and Quincy Railroad Company against The State of Nebraska *ex rel.* The City of Omaha as fully as the same remains on file and of record in my office.

Seal Supreme Court of Nebraska.

In testimony whereof I have hereunto set my hand and caused to be fixed the seal of said court this 7th day of May, A. D. 1896.

D. A. CAMPBELL, *Clerk.*

Endorsed on cover: Case No. 16,300. Nebraska supreme court. Term No., 524. The Chicago, Burlington & Quincy Railroad Company, plaintiff in error, *vs.* The State of Nebraska *ex rel.* The City of Omaha. Filed May 16, 1896.

No. 524. 178.

Motion Papers.

Filed Mar. 9, 1897.

IN THE SUPREME COURT

OF THE UNITED STATES.

Office Supreme Court, U. S.
FILED.
MAR 9 1897
JAMES H. McKENNEY,
CLERK.

NO. 524.

THE CHICAGO BURLINGTON AND QUINCY RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE STATE OF NEBRASKA EX REL., THE CITY OF OMAHA,
Defendant in Error.

Motion to Advance Cause for Hearing and Stipulation.

C. J. GREEN,
Attorney for Plaintiff in Error.

W. J. CONNELL,
Attorney for Defendant in Error.

LEW. W. RAMER, Printer, N. Y. Life Building, Omaha

IN THE SUPREME COURT

OF THE UNITED STATES.

NO. 524.

THE CHICAGO BURLINGTON AND QUINCY RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE STATE OF NEBRASKA EX REL., THE CITY OF OMAHA,
Defendant in Error.

Motion to Advance Cause for Hearing.

And now comes the defendant in error in the above entitled cause, and moves this honorable court to advance this cause for hearing so that the same may be heard and determined at the earliest day practicable, the said cause being one of great public interest and concern.

As a part of this motion and in support thereof, the said defendant in error respectfully refers to its printed brief on file herein in support of its motion to dismiss and affirm heretofore overruled, and also to the written stipulation of said parties agreeing that

said cause, by reason of the public interests involved, shall be advanced.

THE STATE OF NEBRASKA
EX REL., THE CITY OF OMAHA,
DEFENDANT IN ERROR,
By W. J. CONNELL,
Attorney for Defendant in Error.

STIPULATION.

It is hereby stipulated and agreed by and between the parties to the above entitled cause that in view of the public interest in said cause and the urgent necessity for a speedy and final determination thereof, said cause shall be advanced for hearing so that the same may be heard and finally determined at the earliest time practicable, as may suit the convenience of the court.

C. J. GREEN,
Attorney for Plaintiff in Error.
W. J. CONNELL,
Attorney for Defendant in Error.

Dated OMAHA, NEBRASKA,
February 20, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 324.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEBRASKA, EX REL. THE CITY OF OMAHA, DEFENDANT IN ERROR.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

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Gibbs Print., 17 and 19 Murray Street, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 524.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR.

vs.

THE STATE OF NEBRASKA, EX REL., THE CITY OF OMAHA, DEFENDANT IN ERROR.

BRIEF AND POINTS FOR PLAINTIFF IN ERROR.

Statement of Case.

The Omaha & Southwestern Railroad Company was incorporated in 1869 under the provisions of Chapter 25, Revised Statutes of Nebraska, 1866, and immediately constructed its line from Omaha southwesterly through Douglas and Sarpy counties to a point near the Platte river in the county last named and operated it until 1871, when, by lease for 999 years, it transferred all its property and franchises to the Burlington & Missouri River Railroad Company in Nebraska, a corporation then existing under the laws of said state. The last named company operated the road until 1880, when it became consolidated with the plaintiff in error, an Illinois corporation, and sold

and transferred to this company all its property and franchises, including its interest so as aforesaid acquired of the Omaha & Southwestern Railroad Company.

The act under which the last named company was incorporated contained this provision:

"Sec. 82. If it shall be necessary in the location of any part of any railroad to occupy any road, street, alley or public way or ground of any kind or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authority owning or having charge thereof, and the railroad company to agree upon the *manner* and upon the *terms and conditions* upon which the same may be used or occupied.

And also this further provision:

"Sec. 103. Every railroad corporation shall maintain and keep in good repair all bridges and their abutments which such corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike road, canal, watercourse or other way."

At the time of the organization of the company last named, there was no provision either in the constitution or in the laws of the state reserving to the latter the right to alter or amend the charter.

From 1881 to 1887 Omaha was a city of the first class; its corporate existence being assured and its powers and duties defined by Chapter 17, laws of Nebraska, 1881, providing for the incorporation of such cities and the laws amendatory thereof and such other public acts applicable to such cities as the legislature may from time to time pass. It had by these provisions the care and control of its streets and could open,

vacate or alter them at pleasure, subject to such regulations and restrictions as the law provided.

It could also make all contracts and pass such acts in relation to the property and concerns of the city as were necessary to the proper exercise of its powers.

The mayor and city council were authorized to exercise their power and to pass any and all ordinances not repugnant to the constitution and laws of the state.

In 1884, the plaintiff in error, in the name of the Omaha & Southwestern Railroad Company, secured from the city of Omaha the right to locate and operate its tracks across certain streets and alleys in said city and particularly across Eleventh street. This right was granted by ordinance number 729. (Rec. 70.) Section 2 of this ordinance reads:

> "Said Omaha & Southwestern Railroad Company shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portion of said streets and alleys as a part of its line; Provided, *that said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may be, and so as to interfere as little as possible with the travel along and upon said streets;* and, Provided, that nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company in any portion of the streets and alleys herein named and enumerated."

In compliance with this provision, the plaintiff in

error immediately constructed its line of railroad from Tenth street in said city southwesterly to the limits thereof and located the same across Eleventh street aforesaid.

Long prior to the date last mentioned, the Union Pacific Railway Company, having acquired a right to do so, had located and was operating a large number, to-wit: twenty-one railway tracks, across said Eleventh street, which practically occupied it between the south line of Marcy street and the north line of Leavenworth street. These tracks were in constant use, both for general traffic and switching purposes, so that the location and operation of an additional track by the respondent alongside thereof, did not materially increase the inconvenience or danger to the public in the use of said street.

In 1885, the legislature of the state passed an act entitled: "An act to provide for viaducts, bridges and tunnels in certain cases, in cities of the first class," which took effect March 4th of that year. See Chap. 12, laws of Nebraska, 1885. From this act is quoted:

"Section 1. That the mayor and city council in any city of the first class shall have power, whenever they deem any improvement, herein provided for, necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct, or bridge over, or tunnel under any railroad track or tracks, switch or switches in such cities, when such track or switches cross or occupy any street, alley or highway thereof, in the manner and to the extent hereinafter provided.

Sec. 2. Whenever any such viaduct, bridge or tunnel shall be deemed necessary, as provided in the preceding section, the mayor and city council shall have the power to secure

and adopt plans and specifications therefor, together with the estimated cost of the work, and thereupon, if the railroad company or companies, across whose tracks or switches the work is proposed to be built, will assume three-fifths (3-5) of all damages to abutting property on account of construction of said viaduct, bridge or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require, and when the payment of the further sum of one-fifth (1-5) of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donations or by execution of good and sufficient bond as will protect said city from the payment of said one-fifth (1 5), then the said mayor and council may proceed to contract with the necessary party or parties for the construction of such viaduct, bridge or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one-fifth (1-5) of the cost thereof by the city, by special tax on all taxable property in such city, and one fifth (1-5) by special tax to property benefitted, as provided in the following section, if not otherwise provided for.

Sec. 3. * * * * * * *

Sec. 4. The city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge or tunnel as herein provided, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street railway company. And the compensation for such use shall be set apart and used towards the maintenance of such viaduct, bridge or tunnel.

Sec. 5. * * * * * * *

Sec. 6. The mayor and council of any such city shall have the

power to pass any and all ordinances, not in conflict with this act, that may be necessary or proper for the construction, *maintenance and protection* of the works herein provided for.

Sec. 7. * * * * * * * *

In 1886, by virtue of the provisions of this act and in compliance therewith, the city of Omaha and the Union Pacific Railway Company and the plaintiff in error entered into an agreement in writing, covering certain matters and things, among them the construction of a viaduct on Eleventh street across the tracks then owned and operated by these railway companies. This agreement is fully set out in the record (page 22) and it will be necessary to quote the provision only relating to the viaduct in question.

"* * * Witnesseth: That the said parties of the second part, in pursuance of the provisions of an act of the legislature of the state of Nebraska, entitled, 'An act to provide for viaducts, bridges and tunnels in certain cases in cities of the first class,' do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street in said city over the railroad tracks of the said parties of the second party, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars ($90,000), the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company and one-fourth thereof to be

paid by said Omaha & Southwestern Railroad Company.
* * *

The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and damages, in the same manner and according to the same division as hereinbefore agreed. * * *"

Under this contract, the viaduct was built and formally opened to the use of the public early in 1887. Its superstructure is iron supported by stone abutments, the portion over the main tracks being supported by heavy stone piers. The four beams are of heavy wood upon which is laid a wooden pavement. The complete structure is in every respect first class and designed to be of the strength and endurance possible to viaducts of its class.

It was contemplated at the time it was constructed that the wooden floor would necessarily wear out at different places at periods from three to ten years; so that in the ten years the entire floor would be renewed, parts at such times as might be necessary. Owing, however, to the extraordinary use of the viaduct by the travel natural to Tenth street as well as Eleventh street, and by the street railway company, the natural life of the flooring was reduced from ten to about five years.

In January, 1891, when the viaduct on Tenth

street was opened for public use, the travel over the Eleventh street viaduct was diverted to the Tenth street viaduct. In the meanwhile, however, the extraordinary use already made of the Eleventh street viaduct with the neglect of the city to make the necessary repairs, brought it to its present unsafe condition, so that its continued use, even for the travel natural to Eleventh street, was inconvenient and dangerous. A subsequent examination by competent engineers and by the committee of the city council referred to in the pleadings and testimony, disclosed the fact that it would require about $13,000 to renew the flooring and restore the viaduct to the condition in which it would have been, had the repairs been made from time to time when necessary and as contemplated by the parties when they executed the contract for its construction. (Rec. pp. 8, 9, 10 and 11.)

While the events above recited were transpiring, the defendant in error, through legislative aid, was being developed into a metropolitan city with its present powers and duties. The evolution began in 1887 by the adoption of an act, entitled: "An act incorporating metropolitan cities, and defining, regulating, and prescribing their duties, powers and government." Laws of Nebraska, 1887, p. 105, approved March 30, 1887. Section 48 of this act prescribed under what circumstances and in what manner railroad companies *owning or operating* any railroad track or tracks upon or across any public street or streets of such cities might be compelled to construct and maintain viaducts thereon. It reads as follows.

"Sec. 48. The mayor and council shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct, re-construct, complete, and keep in repair any viaduct or viaducts, upon or along such street or streets, and over or under such track or tracks, including the approaches to such viaduct or viaducts as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. *Provided*, That the approaches to any such viaduct, which any railroad company or companies may be required to construct, re-construct, and keep in repair, shall not exceed, for each viaduct, a total distance of eight hundred feet. Whenever any such viaduct shall be deemed and declared by ordinance necessary for the safety and protection of the public, the mayor and council shall provide for appraising, assessing, and determining the damages, if any, which may be caused to any property by reason of the construction of such viaduct and its approaches.

The proceedings for such purpose shall be the same as provided herein for the purpose of determining damages to property owners by reason of the change of grade of a street, and such damages shall be paid by the city, and may be assessed by the city council, against property benefited, and the cost of approaches beyond said distance of eight hundred feet may also be assessed by the council against property benefited by reason of the construction of any such viaduct and its approaches.

The width, height and strength of any such viaduct, and the approaches thereto, the material therefor, and the manner of the construction thereof, shall be as required by the board of public works, as may be approved by the mayor and council.

When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the pro-

portion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council.

After completion of any such viaduct, any revenue derived therefrom by the crossing thereon of street railway lines, or otherwise, shall constitute a special fund, and shall be applied in making repairs to such viaduct.

All ordinary repairs to any such viaduct, or to the approaches thereto, *shall be paid out of such fund, or shall be borne by the city.*"

Subsequently, in 1893, the legislature amended this act to read as it now stands. Laws of Nebraska, 1893, p. 70, chap. 3, sec. 7. It will only be necessary therefore to quote the words omitted from and added to the original section. The words omitted are:

"Provided that the approaches to any such viaduct which any railroad company or companies may be required to construct, re-construct and keep in repair, shall not exceed for each viaduct a total distance of 800 feet."

Also:

"And the cost of approaches beyond said distance of 800 feet may also be assessed by the council against property benefited by reason of the construction of any such viaduct and its approaches."

Also:

"After the completion of any such viaduct, any revenue derived therefrom by the crossing thereon of street railway lines or otherwise, shall constitute a special fund and shall be applied in making repairs to such viaduct."

Also:

"All ordinary repairs to any such viaduct or to the approaches

thereto shall be paid out of such fund or shall be borne by the city."

The words added are:

"It shall be the duty of any railroad company or companies upon being required as herein provided, to erect, construct, re-construct or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, re-construct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars ($100) and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceeding to erect, construct, re-construct or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power whenever any railroad company or companies shall fail, neglect or refuse to erect, construct, re-construct or repair any viaduct or viaducts after having been required so to do as herein provided, to proceed with the erection, construction, re-construction or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the cost of the erection, construction, re-construction or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, re-construct or repair the same, and such cost shall be a valid and subsisting lien against such property, and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court."

In May, 1890, the Union Pacific Railway Com-

pany entered into an agreement in writing with the Chicago, Rock Island & Pacific Railway Company, by which it gave to that company for the term of nine hundred and ninety-nine years the full, equal and joint possession and use of its main and passing tracks then or thereafter to be located and established between the terminus of such tracks in the city of Council Bluffs, Iowa, and a line drawn at a right angle across said tracks within one and one-half miles southwesterly from the passenger station at South Omaha, Nebraska, including the bridge on which said tracks extend across the Missouri river between the cities of Council Bluffs and Omaha; also, connections with the Union depot tracks in Omaha, the side and spur tracks leading from the main tracks to the lower grade of the Pacific company's sidings and spur tracks in Omaha and such extensions as might be thereafter made. These tracks, located and established upon the main right of way of the Pacific company and also the spur or side track leading therefrom to the lower grade as aforesaid, are included among the twenty-one tracks already noticed and cross Eleventh street under the viaduct in question.

On the same day a similar contract was made between the Pacific Company and the Chicago, Milwau- & St. Paul Company. Subsequently, in the same year, each of these companies by virtue of its contract, entered into the possession and enjoyment of the rights and interests thereby secured and have continued in the same until the present time. The Rock Island Company has been occupying and using its tracks not only for its local traffic in Omaha and

South Omaha, but also as a part of its through line between Chicago, Illinois, and Denver, Colorado, and has been operating thereon numerous daily freight and passenger trains and also numerous special or extra trains. The Milwaukee company has been occupying and using its tracks not only for its local traffic in Omaha but also as a part of its through line between Chicago and South Omaha aforesaid. Each of said companies operate as many trains daily and run as many locomotives and cars across said street as does this respondent.

Nearly a year after the viaduct had come to its present condition and after considerable controversy between the city and the railroad companies as to which was bound to make the repairs in question, the mayor and city council began the proceedings described in the record by resolution adopted July 21, 1892, (Rec. 8) providing that the committee on viaducts and railways and the city engineer should examine the road-bed of the viaduct and report whether or not it was necessary to repave it. Acting under this resolution, the committee made the examination and on the 23rd of August following, reported in writing the condition of the viaduct. This report appears as exhibit "B" to the city's petition. (Rec. 9.)

Subsequently, on the 4th day of December, 1893, the city council passed ordinance No. 3734, declaring the necessity for the repair of the viaduct by placing thereon a new and substantial floor. This ordinance also contained a provision directing and ordering the board of public works to prepare plans and specifica-

tions for such repairs and to submit same to the mayor and city council for their consideration and approval and also directing the city engineer to render such service to the board as it might require in preparing the necessary plans, drawings, details and specifications which were prepared and submitted to the mayor and city council as directed and approved by them. Copies of the ordinance and of the plans and specifications appear as exhibits "D" and "E" of the defendant in error's petition. (Rec. 9 and 10.)

Subsequently, on January 30, 1894, the city council passed ordinance No. 3752, a copy of which appears as exhibit "F" of the defendant in error's petition. (Rec. 10). Sections 2 and 3 of this ordinance read as follows:

"Sec. 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct and the Chicago, Burlington & Quincy Railroad Company, grantee and successor to the Burlington & Missouri River Railroad Company in Nebraska and the Omaha & Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct commencing at the south end thereof, and extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications and to be done under the supervision of the City Engineer; the said repairs to be commenced without unnecessary delay and fully completed as herein required within ninety days from the passage and approval of this ordinance."

"Sec. 3. That the city clerk be and is hereby directed to furn-

ish to said Union Pacific Railway Company and to said Chicago, Burlington & Quincy Railroad Company owning or operating railroad tracks upon and across said Eleventh street under said Eleventh street viaduct, a duly certified copy of this ordinance without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs."

The required notice having been served upon the plaintiff in error and it having declined to make the repairs, the defendant in error, on the 19th day of January, 1895, filed with the clerk of the district court of Douglas county, Nebraska, a petition praying for a writ of mandamus, and procured its issuance and service upon the plaintiff in error, commanding it to appear before the court on the 4th day of February following, to show cause why it should refuse to make the repairs.

This petition in brief states (rec. 5) that at and before the bringing of this suit the city of Omaha was a city of the metropolitan class, existing under and governed by the provisions of chapter 12 *a*—Cities of the metropolitan class,—Comp. Stats. of Nebraska 1893.

That the plaintiff in error, the Chicago, Burlington & Quincy Railroad Company, was a corporation, created and existing by virtue of the laws of the state of Illinois, and authorized by the laws of the state of Nebraska to transact business as a railroad company in said state and was the grantee and successor of the Burlington & Missouri River Railroad Company in Ne-

braska and of the Omaha & Southwertern Railroad Company; both corporations, organized and existing under the laws of the state of Nebraska. That the plaintiff in error was the owner of and engaged in operating certain railroad tracks across Eleventh street in said city, upon which and across said tracks was located an iron viaduct with plank flooring extending between Jackson and Mason streets, a distance of four blocks, in said city. That this viaduct was built by the plaintiff in error and the Union Pacific Railroad Company and completed about the year 1886 or 1887.

That in 1892, the viaduct had become dangerous for public travel and by reason thereof, the city council, on the 21st of July of said year, passed a concurrent resolution which was approved by the mayor of the city, requiring its committee on viaducts and railways, and the city engineer, to examine and report its condition and the necessity for its repair. That on the 23rd of August following, this committee reported it to be in a dangerous condition and in need of immediate repair, and on the 2nd of September following, the city engineer made a similar report.

That thereafter, the viaduct was closed for public travel and remained so for about two years. That on the 4th of December, 1893, ordinance No. 3734 was duly passed by the city council of said city and duly approved December 12, 1893, by the mayor thereof, declaring the necessity of repairing the viaduct and directing the board of public works to prepare plans and specifications therefor.

That afterwards, pursuant to the provisions of

the ordinance, the plans and specifications were prepared and duly submitted to the mayor and city council and approved by them by ordinance No. 3752, passed January 30, 1894, and approved by the mayor February 2, following.

That thereafter, in February, 1894, pursuant to the provisions of said ordinance the city clerk furnished the plaintiff in error and the Union Pacific Railway Company copies of the plans and specifications and also duly certified copies of the ordinances and proceedings of the city council aforesaid.

That the plaintiff in error refused to comply with the request of the city and to make the repairs aforesaid, or to take any action whatever with reference thereto.

In compliance with the order of the court, the plaintiff in error appeared and filed its answer, (rec. 13) substantially admitting the averments of the petition and furthermore set forth, among other things, that at the time the viaduct in question was constructed, the city of Omaha was a city of the first class existing under and by virtue of the laws of the state of Nebraska providing therefor; that by virtue of an act of the legislature entitled "An act to provide for viaducts, bridges and tunnels in certain cases, in cities of the first class," laws of Nebraska, 1885, p. 109, approved March 4, 1885, it was vested with the power and authority, under certain circumstances, to engage in the construction and maintenance of viaducts and bridges over railroad tracks occupying the streets and alleys within its corporate limits, and

was also authorized by said act, to enter into written agreements or contracts with any railway company or companies occupying any streets or alleys aforesaid, for the purpose of securing the contributions therein provided for, the construction of such viaducts, and the payment of damages arising therefrom. Also, that at and for many years prior to the time when the proceedings to construct the viaduct were instituted, the city of Omaha had been divided by the grades and tracks of certain railway companies so that the use of the several streets in said city, crossing said grades and tracks, was inconvenient and at certain places, viz. on Tenth street, exceedingly dangerous. That during these years, intercourse between the portion of the city south and the portion of the city north of such grades and tracks, was largely maintained by means of Seventh, Tenth, Thirteenth and Seventeenth streets of said city. That for the purpose of providing greater facilities between these parts of the city, the city authorities, pursuant to and in accordance with the provisions of the act last referred to, entered into a written contract with the Union Pacific Railway Company and the Chicago Burlington and Quincy Railroad Company under the name and style of the Omaha and Southwestern Railroad Company, whereby it was agreed between them, that the said railway companies, each for itself, would, at its own expense, open Seventh, Thirteenth and Twentieth streets in said city through their respective rights of way of certain width and also build retaining walls and make certain other suitable provisions for the convenient and safe use of such streets and would also each con-

tribute certain proportions of three-fifths of the entire cost of, and of damages involved in, the construction of certain viaducts upon Eleventh and Sixteenth streets; such cost and damages for the Eleventh street viaduct not to exceed the sum of $90,000 and for the Sixteenth street viaduct not to exceed the sum of $30,000 and the said railway companies would also open Fourteenth street through their respective rights of way at such time and of such character as future public necessity might require, and in consideration of which, the city of Omaha agreed upon its part to construct and maintain the viaducts and to pay two-fifths of the entire cost and damages thereby incurred and to close Sixth, Twelfth and Fifteenth streets in said city and to allow Fourteenth, Eighteenth and Nineteenth streets to remain unchanged. (Rec. 22.)

That the terms of this contract were faithfully performed by the railroad companies; that the city constructed the viaducts and opened the same for public use, as provided in said contract, and in accordance with the provisions of the act of 1885; that at all times since its construction, the viaduct has been the property of the city of Omaha and not the property of the railway companies and that under the laws of the state of Nebraska and under the provisions of its former and present charter and under the contract aforesaid, it was and is the duty of the city to maintain the viaducts in good condition for public use. That since the construction of the viaduct on Eleventh street, to-wit: January 1, 1891, the viaduct

along Tenth street and over the tracks aforesaid was constructed, completed and opened for public use and travel; that on account of its being much more convenient and safe for public use than the one on Eleventh street, it is and will continue to be occupied and used by street railway companies and the general public which formerly occupied and used the Eleventh street viaduct and that should the railway companies or any of them, be compelled to repair the Eleventh street viaduct, in accordance with the demands of the city, it would be very little used by wagons or vehicles or by street railway companies. Also, that the viaduct aforesaid covered a space on Eleventh street of about 1,250 feet, of which about 400 feet are occupied by the several tracks owned or operated by the railroad company; that the remainder of the space was, before the construction of the viaduct, occupied and used for street purposes and was, under the law, controlled and cared for by the city; that the distance from the north line of the space occupied by the tracks aforesaid to the north line of the viaduct, is about 700 feet, and it was submitted that it was not competent for the legislature to put upon the railway companies the burden of maintaining that portion of the viaduct over such unoccupied space of street as the city would, but for such viaduct, be required, under the law, to maintain and repair; that whatever the rule of law might be as to the construction of the viaduct, in any event the city should be required to contribute such proportion of the entire cost of its maintenance as that part of the street under the viaduct bears to the entire part of the street occupied by it

and that any law authorizing the city to impose the cost of the entire maintenance upon the railway companies would be an arbitrary and unwarranted exercise of legislative power and in violation of the constitutions of the state and of the United States. * * *

It was further shown by the answer that since 1886, the Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing by virtue of the laws of the state of Illinois, had established a through line of railway, extending from Chicago, Illinois, to Denver, Colorado, upon which it was operating its freight and passenger trains. That said line was located through the city of Omaha and comprised double tracks located across Eleventh street aforesaid, the same being a part of the twenty-one tracks across said street and under said viaduct built by the Union Pacific Railway Company. Also, that the Chicago, Milwaukee & St. Paul Railway Company, a corporation existing by virtue of the laws of Wisconsin, had, since 1886, established a through line of railway between Chicago, Illinois, and South Omaha, Nebraska, upon which it was operating its frieght and passenger trains. That said line was located through the city of Omaha and comprised double tracks extending across Eleventh street aforesaid, the same being a part of the twenty-one tracks across said street and under said viaduct.

That these companies each by separate contract with the Union Pacific Railway Company, had acquired a joint interest and ownership in the said tracks

used by it. That whatever danger might arise to the public in the use of said tracks or whatever necessity there might be for the construction and maintainance of a viaduct thereon, the danger and necessity alike originated as much in the use and operation of the tracks by the two companies last named as from the use by plaintiff in error of its single track across said street.

It was also submitted by the answer that it was not competent for the legislature to impose upon the plaintiff in error the duty of maintaining or repairing the Eleventh street viaduct for the reason that to do so would be in *violation of the obligation of the viaduct contract and contrary to the provisions of the constitution of the United States.*

It was also submitted that the allegation contained in the petition, wherein is described the several proceedings in the city council and board of public works as well as the several acts alleged to have been performed by its representatives and officials relating to the repair of the viaduct were wholly unauthorized and unwarranted and of no effect as far as the plaintiff in error was concerned and that the omission of any and all reference to the several railway companies owning and operating tracks across Eleventh street under the viaduct, rendered the proceedings upon the part of the city unwarranted, arbitrary, unjust and illegal and the plaintiff in error denied that it was bound to maintain or keep in repair the viaduct or to contribute thereto.

It was further set forth that the Union Pacific

Railway Company had refused and was still refusing to recognize the right of the city of Omaha to require it to contribute towards the repair or maintenance of the said viaduct and had refused and was still refusing to comply with the ordinances and requirements of the said city in that behalf.

It was further alleged that according to the plans and specifications referred to, the estimated cost of the repair of the Eleventh street viaduct, would be about $13,400 and that the city was asking that the plaintiff in error be compelled to repair the north one-third of the viaduct without regard as to whether the cost of repairing such proportion would be one-third of the cost of repairing the entire viaduct, and it was submitted that the question of apportioning the cost of the said repairs between the several railway companies named, is *one for the courts* and that there were no facts stated in the petition upon which it could be judicially determined what would be a fair and equitable distribution thereof among the several companies operating the tracks aforesaid; and further, that the attempt upon the part of the city council and board of public works, described in the petition, to apportion the cost of repairing and maintaining the north one-third of the viaduct to the plaintiff in error herein, was an arbitrary, unwarrantable, inequitable and discriminating act against it and that the *city was without jurisdiction or support* either in law or equity.

Upon the trial, testimony was received merely for the purpose of making more definite some of the matters pleaded. There was practically no contro-

versy respecting the circumstances of the case. The contest involved only the construction of legislative enactments and the validity of municipal proceedings.

In the argument of the case, the railroad company insisted:

1. That by the terms of section 48 of the metropolitan charter, the city was required to impose the burden of maintaining the viaduct upon all the railroad companies operating the tracks under it and therefore in attempting to lay it upon two of the four companies named, it had cheated itself of jurisdiction and thereby rendered its proceedings unauthorized and void.

2. That if by section 48, the city was authorized to impose the burden aforesaid upon two of the four companies named, then the section itself was void as an attempt upon the part of the state to arbitrarily compel the surrender of private property for public uses without compensation and for the benefit of other citizens.

3. That section 48 was vicious because it contained no provision whatever requiring notice to railroad companies of the proceedings therein provided for or affording them an opportunity to be heard.

4. That these proceedings were in fact without notice to the railway companies affected by them, and without affording them an opportunity to be heard.

5. That these proceedings, if consummated, would impair (a) the obligations of the contract under which the track of the plaintiff in error across Elev-

enth street was located, and (b) the obligations of the contract under which the viaduct thereon was built.

The trial court, however, rejected these contentions and rendered judgment for the city, whereupon the railroad company filed a motion for a new trial (rec. 34) which was promptly overruled and a peremptory writ of mandamus ordered to be issued in accordance with the prayer of the petition. (Rec. 36.) Thereupon the railroad company carried the controversy to the state supreme court where it was re-examined and the judgment of the trial court affirmed.

In its petition in error to that court, (rec. 1), the railroad company alleged that the trial court erred in rendering its judgment for many reasons and among these the following:

That the judgment was contrary to law.

That the city had no power or authority to require or compel the railroad company to repair the viaduct.

Also in holding that the provisions of section 48 did not impair the obligations of the contract under which the viaduct was built and also the obligations of the contract created by the laws of the state under which the railroad company was incorporated and the city ordinance 729 under which its track across Eleventh street was located.

Also in not holding section 48 unconstitutional.

Also in refusing to adjudicate the issues made by the pleadings in the case.

Also in holding that the charter of the railroad

company and ordinance 729 did not constitute a contract within the protection of the constitution of Nebraska and of the United States, guaranteeing its inviolability.

Also in arbitrarily compelling the railroad company to repair one-third of the viaduct inasmuch as it owned and operated a single track of the twenty-one or more tracks across Eleventh street under the viaduct, such requirement being arbitrary, unjust, inequitable and unconstitutional.

Also in holding that the Union Pacific Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Chicago, Milwaukee and St. Paul Railway Company were not necessary parties with the plaintiff in error to the proceedings to determine the proportion which each should bear of the cost of repairing the viaduct.

Also in not deciding that the apportionment of one-third of the cost of repairing the viaduct to the plaintiff in error, was the inequitable, unjust and arbitrary, and in not holding that the action of the city council in making such apportionment was subject to review in the proceeding in the trial court.

Upon the hearing in the state supreme court, no question was raised as to the right of the plaintiff in error to be heard upon all the questions relating to the power and authority of the city to compel it to repair the viaduct.

In its brief and argument, the railroad company, as in the court below, insisted that section 48 and the proceedings by the city council, in pursuance thereof,

if consummated, would deprive it of its property and rights secured by the federal constitution, and that court in rendering its opinion, stated the questions considered and decided in these words: (Rec. 84.)

"To summarize briefly, we conclude, from the foregoing authorities and many others examined, that the legislation assailed in this case is a valid exercise of the police power of the State over the subject to which it applies; that it does not authorize the appropriation of the respondent's property without due process of law in a constitutional sense, since the latter is enabled to invoke the equal protection of the law by any appropriate proceeding, and because it did in fact, put in issue by the answer both the validity of the ordinance and the reasonableness of the amount apportioned to it for the repair of the viaduct in question. Nor is such legislation violative of any contract obligation, since the power to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety cannot be bartered away by contract or otherwise. Such power is inherent in the sovereignty of the state, and may be asserted directly by the legislature, or may, in the absence of constitutional restriction upon the subject, be delegated to the several municipal corporations or other agencies provided for its exercise. The single purpose of the legislation, whether contemplating the erection or re-construction of the viaduct, is to reduce to a minimum the danger to life and limb for which the railroad companies are chiefly responsible, and it is not unreasonable to require the parties to maintain the street in a condition of safety, for whose benefit and convenience it was originally rendered unsafe."

Upon this record, the plaintiff in error has

brought the controversy to this court for review upon the following assignment of errors: (Rec. 91.)

"1. The supreme court of Nebraska erred in making the decree or judgment rendered in this suit and in affirming the erroneous judgment therein of the district court of Douglas County, Nebraska.

2. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the constitution of the United States.

3. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the constitution of the United States.

4. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the constitution of the United States.

5. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on Janu-

ary 30, 1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the provisions of the constitution of the United States.

6. The decree or judgment is erroneous in that it deprives the Chicago, Burlington & Quincy Railroad Company of its property and confers it upon other persons for a private use, contrary to the constitution of the United States.

7. The decree or judgment is erroneous in that it deprives the Chicago, Burlington & Quincy Railroad Company of its property without making just compensation therefor, contrary to the constitution of the United States and in abridgement of the privileges and immunities of the Chicago, Burlington & Quincy Railroad Company, thus denying to it the equal protection of the law.

8. The decree or judgment is erroneous in that it deprives the Chicago, Burlington & Quincy Railroad Company of its property without due process of law, contrary to the constitution of the United States."

The defendant in error has filed its united motions herein to dismiss the writ for want of jurisdiction and to affirm the judgment of the state court and in support thereof insists:

1. That this court is without jurisdiction for the reason that the record does not show a case within the purview of section 709 of the revised statutes.

2. That, conceding the case to be within the jurisdiction of this court, the judgment of the state court should be affirmed on motion, for the reason that the question on which the jurisdiction depends is so frivolous as not to need further argument; that paragraph 5 of rule 6 of this court should be applied to it.

The contention that this court is without jurisdiction is based upon the assumption that in the present case, no federal question has been, either in express terms or by *necessary effect*, decided by the state courts and that it does not appear from the record of either the pleadings, the evidence, the findings of fact or the opinions and judgments of the courts that the plaintiff in error claimed any of the rights guaranteed to it by the federal constitution.

In view of the recitals of the record, it seems unnecessary to do more than to suggest that both in the trial and the supreme courts of the state it was strenuously urged that to compel the railroad company to furnish the repairs in controversy would operate:

a. To impair the obligations of the contracts mentioned in the pleadings and evidence;

b. To deprive the company of its property without due process of law, and to deny it the equal protection of the laws.

Since, therefore, these invasions were in terms authorized by the provisions of section 48 of the charter of the defendant in error, the appeal to the courts was for the sole purpose of enforcing a law passed in violation of the provisions of the federal constitution and every question raised during the progress of the controversy was considered and adjudged with reference to the validity of this section.

Numerous cases involving the rights of litigants under the federal constitution and presented *in form and mode the same as in the case at bar* have been brought here for review from the judgments of the

highest state courts. The decisions in these cases clearly establish the jurisdiction of this court over the judgments of the highest courts of the state wherever rights acknowledged and protected by the federal constitution are invaded or denied under the shield of state legislation, and the form and mode in which the federal questions are raised are of minor importance, if in fact they were raised and decided.

Wilson v. Black-bird Creek Marsh Co., 1 Peters, 245;

Satterlee v. Matthewson, 2 Peters, 410;

Bridge Proprietors v. Hoboken L. & I. Co., 68 U. S., 116;

Murray v. Charleston, 96 U. S., 432;

Furman v. Nickel, 75 U. S., 44.

In *Wilson v. Black-Bird Creek Marsh Co.*, the company had instituted an action of trespass against Wilson in the supreme court of Delaware for damages to its dam across a creek constructed under an act of the general assembly of Delaware. To the plea of Wilson denying the capacity of the act to authorize a dam across a navigable stream, the company interposed demurrers which were sustained and judgment rendered for the company. The case having been carried to the state court of appeals and there affirmed, it was prosecuted by writ of error to the supreme court of the United States and upon the hearing, the jurisdiction of this court was questioned, for the reason that the record failed to disclose that the constitutionality of the act of the legislature was

drawn in question. In delivering the opinion of the court, Mr. Chief Justice Marshall said:

> "Undoubtedly, the plea might have stated in terms that the act, so far as it authorized a dam across the creek, was repugnant to the constitution of the United States and it might have been safer, it might have avoided any question respecting jurisdiction so to frame it—but we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court. * * * It is not necessary to state in terms on the record that the constitution or law of the United States was drawn in question. * * * It is sufficient that the constitutionality of a state law was questioned and the decision has been in favor of the party claiming under such law."

In *Bridge Proprietors v. Hoboken L. & I. Co.*, the proprietors in their bill in the lower court alleged an exclusive right to construct and operate bridges within certain limits proscribed by an act of the legislature of New Jersey. They also charged that by a subsequent act of the legislature, that state had authorized the company to erect and maintain a bridge within the limits aforesaid and averred that such proceeding would violate the contract between them and the state under which they had erected their bridge. The bill having been dismissed, the suit was brought to this court where objection was made to its jurisdiction because in the pleadings it was not stated in terms, that the statute was void for the reason it was in conflict with the constitution of the United States.

Mr. Justice Miller, in delivering the opinion of the court, said:

> "It would be a new rule of pleading and one altogether superfluous to require a party to set out specially the provision of the constitution of the United States on which he relies for the action of the court in the protection of his rights. If the courts of this country and especially this court can be supposed to take judicial notice of anything without pleading it specially, it is the constitution of the United States, and if the plaintiff and defendant in their pleadings make a case which necessarily comes within some of the provisions of that instrument, this court usually can recognize the fact without requiring the pleader to say in words, 'this paragraph of the constitution is the one involved in this case.' "

Mr. Justice MILLER also quotes from the opinion of Mr. Justice Story in the case of *Crowell v. Randall*, 10 Peters, 368, the rules therein stated, as necessary to bring a case within the 25th section of the judiciary act. The third of these rules is: "That it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms *ipsissimus verbis*, but that it is sufficient, if it appears by clear and necessary intendment, that the question must have been raised and must have been decided in order to have induced the judgment."

And further, speaking of the effect of dismissing the bill on the pleadings, Mr. Justice Miller said: "It could not have done this, without holding the act of 1860 to be valid, as it was the only authority on which defendants rested their right to build any structure over the Hackensack river."

In *Murray v. Charleston*, the plaintiff was the owner of certain stock certificates issued by the city, whereby it promised to pay to the owners thereof the sums of money therein mentioned together with 6 per cent. interest, payable quarterly. The city having retained a portion of the accrued interest on these certificates, suit was commenced in the state court to recover it. The answer to the complaint admitted the retention charged, but attempted to justify it under certain city ordinances which were therein set out in full. By these ordinances, the city appraiser was directed to assess a tax of two cents upon the dollar of all real and personal property in the city of Charleston for the purpose of meeting the expenses of the city government. The third section of each ordinance declared that the taxes assessed on city stock should be retained by the city treasurer out of the interest thereon when the same became due and payable. On these pleadings, the case was submitted to the court for trial without a jury and the court made a special finding of facts, substantially as set forth in the complaint and averred in the answer, upon which judgment was given for the city. This judgment being affirmed in the supreme court, the case was, by writ of error, brought to the federal supreme court. It was objected upon the hearing that this court had no jurisdiction of the case because no federal question was raised of record or decided in the court of common pleas where the suit was commenced. Mr. Justice Strong delivered the opinion of the court, and among other things, said:

"The city ordinances were in question on the ground of their

repugnancy to the inhibition upon the states to make any law impairing the obligation of contracts and the decision was in favor of their vilidity. Nothing else was presented for decision unless it be the question whether the acts of the state legislature authorized the ordinances and that was ruled affirmatively. The jurisdiction of this court over the judgment of the higher courts of the state is not to be avoided by mere absence of express reference to some provision of the federal constitution. Wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of state legislation, this court is authorized to interfere. The form and mode in which the federal question is raised in the state court is of no minor importance if, in fact, it was raised and decided."

In *Satterlee v. Matthewson*, 2 Peters, 410, Mr Justice Washington, delivering the opinion of the court, states clearly the rule to be:

"That if it sufficiently appear from the record itself that the repugnancy of the statute of a state to the constitution of the United States was drawn into question, or that that question was applicable to the case, this court has jurisdiction of the cause under the section of the act referred to, although the record should not in terms state a misconstruction of the constitution of the United States, or that the repugnancy of the statute of a state to any part of that constitution was drawn in question."

In his brief, the counsel for defendant in error cites several cases in support of his contention, but the records in those cases differ from the record in this case in this; that in the former, it does not appear that any questions involving the constitutional rights of the plaintiff in error were litigated or decided by

the state courts, whereas in the latter, there was little else litigated and decided.

The manner in which litigants in state courts should set up or claim their constitutional rights, so as to confer upon the federal supreme court jurisdiction to review the adverse judgments therein, must necessarily depend upon the nature of the rights and the circumstances under which they are involved. Thus, in the anarchist case, cited by opposing counsel, the alleged seizure of the Most letter, even in violation of the constitutional rights of the defendant Spies, could not be involved in a prosecution against him for an alleged crime, except it were specially brought to the attention of the court and made the foundation of an objection to the admission of the letter offered in evidence against him. This, however, was not done and in its opinion the federal supreme court states that it had searched the record in vain for any evidence that such an objection had been made.

As the decisions in the cases noted herein abundantly assure the jurisdiction of this court, it will be unnecessary to consider that part of the opposing counsel's brief wherein he attempts to demonstrate that the questions here urged are not stated in express terms in the record, or necessarily involved in the judgment of the state courts.

Assuming the case to be within the jurisdiction of the court, it is insisted that the judgment of the state supreme court should be affirmed for the reason that the questions now presented have been decided by this court and in support of this contention cites

the case of *New York and New England Railroad Company v. Town of Bristol*, 151 U. S., 556, with the assurance "that there is not a material contention made by this plaintiff in error that was not made and decided adversely to it in the above case. In fact it is of such similar import that the law of one case must be taken as the law of the other."

A careful reading of that case, however, has failed to disclose to counsel for plaintiff in error that it involved a single proposition presented in the case at bar. There the right of the state to amend, alter or repeal the charter of the railroad company was "reserved specifically and under general laws," and furthermore, the company was accorded a protracted hearing before the railroad commissioners, which occupied several days during a period of more than four months and also a full hearing under the laws of the state in the superior and supreme courts thereof.

The exercise of the reserved right of the state under its contract with the company to provide for suitable railroad crossings, could not be affected by the provision of the federal constitution guaranteeing the inviolability of contract obligations. Neither could it be claimed that by such proceedings, the company had been denied the equal protection of the laws or its property taken without due process of law.

Even the contention of the railroad company that the commissioners in the exercise of their powers, had exceeded the limits of reason and justice, pre-

sented no question arising under the federal constitution, for whether the whole or part of the cost of removing the crossing should have been imposed upon the company, was purely a question of fact to be determined under the circumstance of the case, by the commissioners in the first instance, and subsequently by the state courts, and whether or not this question was *correctly* settled, is not a matter for review in the federal supreme court. The federal constitution does not guarantee that the verdicts and judgments of the state courts involving any of its provisions, shall conform to "those general ideas of the requirements of natural justice" which may be entertained here.

But in the case at bar, the questions arising upon the record may be stated:

1. That the act in question—section 48 metropolitan charter—as interpreted by the state supreme court, delegates to the municipalities therein provided for, authority, in cases where two or more railway companies owning or operating tracks across public streets, to impose the cost and expense of constructing and maintaining viaducts over the same, upon either or any of such companies, and that city ordinance number 3752, in execution of such authority, imposes upon two of the four companies named in the record, the entire expense of the repairs in question. This interpretation of the act and the proceedings to enforce it operate to deny the plaintiff in error the equal protection of the law.

2. The act in question contains no provision whatever securing a hearing to interested railroad

companies in the proceedings before the city council for apportionment of burdens, and is also framed in such manner that no hearing whatever can be had before the courts except at the option of the city authorities, and even then a hearing cannot be had without incurring enormous fines and penalties in case of defeat.

3. That a hearing has been, in fact, denied plaintiff in error both in the proceedings before the city council, and also in the subsequent proceedings in the state courts.

4. That the enforcement of the provisions of the act in question and of the city ordinance number 3752 making the same effective against the plaintiff in error, will impair the obligations of the contract under which the viaduct in question was constructed; and will also impair the obligations of the charter contract under which the Omaha & Southwestern Railroad Company was organized and by virtue of which it located, in accordance with the provisions of ordinance 729 of the defendant in error, its track across Eleventh street.

PROPOSITION I.

The act in question—section 48, Metropolitan Charter—as interpreted by the state courts and applied in the proceedings by the city council, deprives the plaintiff in error of the equal protection of the laws.

The record in this case discloses that since 1890, four great railroad corporations have been operating,

each for itself, a line of railroad across Eleventh street upon the tracks located under the viaduct, in the manner and by virtue of the permanent rights and arrangements described in the recital. It also appears that so far as this proceeding was developed in the city council of the defendant in error, it was directed only against two and so far as it has been conducted in the courts, its force is being discharged against only one of these corporations.

It is insisted that each step in this proceeding has been taken in strict compliance with that provision of section 48, wherein the legislature directs what railway companies, if any, may be compelled to erect viaducts and keep them in repair. The provision is: "The mayor and council shall have power to require any railroad company or companies owning or operating any railroad track or tracks upon or across any public street or streets of the city, etc., etc."

The question presented here is, where four independent railroad companies are each operating a separate line of railroad upon tracks across the public street of a city of the metropolitan class, thereby rendering the use of such street dangerous for the public, can the state arbitrarily impose upon two of these companies, the burden of constructing or maintaining a viaduct thereon?

If the state can do this, then under no circumstances can there arise the necessity for an apportionment, for what the state may do in such matters by legislative enactment, it may authorize its municipality to do. Since, therefore, the entire burden may be

imposed upon one or several companies, it may also be imposed upon any or all of them and even in a proceeding to apportion the burden between all the companies, should the result in fact be manifestly unreasonable and unjust, still it could not be so in law.

The act authorizes the taking of property of the citizen for public uses without compensation. If the state has the power to do this, it must be upon the theory that the citizen is either responsible for the danger which makes necessary the improvement provided for, or will be especially benefited by it to the extent of the amount exacted from him in that behalf, or both.

Here are four railway companies, each one engaged in a business, in the manner of conducting which, the state finds the necessity and justification for the act in question. How, then, can the state itself, *arbitrarily select or permit to be selected, two of these companies to the exclusion of the remainder, and impose upon them the entire cost of an improvement made necessary by the business operations of each, and from which each will derive substantially the same benefit?*

Every maxim and principle of constitutional government, sentinels the property of the citizen and guards against the arbitrary exactions of his government, and under no circumstances whatever ought the state to be permitted to arbitrarily compel the citizen to surrender his property for the public good without compensation. That under certain circumstances, it may compel a surrender of private property for public use without compensation, is conceded but

that it can *arbitrarily* do so, is most earnestly denied. Equality before the law is the inspiration and boast of free government. Every seizure of private property for public use must not only be justified as a matter of public necessity, but its appropriation must be made with reference to the established principles of justice and equality. Every time the state ignores these principles it passes the boundary line which separates a constitutional from an arbitrary exercise of power, and not only despoils the citizen of his rights, but also violates the sacred covenant the people have made between themselves and their government. *Is it not enough that one's property may be wrested from him under the plea of state necessity, that the spoliation must be infected with the vice of an arbitrary discrimination?*

There is not a line in the organic act of the commonwealth relating to the imposition of public burdens, which does not reveal the spirit and purpose of the people to equalize among themselves these forced contributions. For instance, revenues needful for general purposes, must be derived through "taxes levied by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or its property and franchises." Revenues for municipal purposes must be recruited by means of "taxes uniform in respect to persons and property within the jurisdiction of the corporation imposing them" while the authority to make local improvements is qualified with the requirement that "special assessments or tax-

ation in that behalf, shall be laid upon the property benefited."

Our libraries are bursting with reported cases in which taxes and special assessments, though imposed in strict compliance with legislative direction, have been denounced by courts because the prescribed method or system contravenes plain principles of justice and equality.

In the present case, the act in question, as construed by the state supreme court, amounts to nothing less than an attempt upon the part of the state to put into the form of a legislative enactment an unjust and arbitrary exaction, and of that class, too, the heaviest that can be borne by the citizens of a free republic. In construing this act the court said:

"Equally groundless is the contention that the city was required to proceed against the Chicago, Rock Island & Pacific and the Chicago, Milwaukee & St. Paul Railroad Companies then engaged in operating jointly with the Union Pacific Company, certain tracks belonging to the latter across Eleventh street and under said viaduct. The statute as we have seen, authorizes the city to require two or more railroad companies, owning or operating separate lines of track, to erect, construct, reconstruct or repair viaducts. If we admit the companies named as lessees of the Union Pacific Company, to be within the terms of the act, it does not follow that they are in any sense necessary parties to the proceeding since the city might still have proceeded against the owners of the tracks operated by them. Such is the plain and necessary inference from the language of the statute."

That the legislature may vest in cities of the metropolitan class, power to compel railway com-

panies, in certain cases, to build and maintain viaducts may, for the purpose of this argument, be conceded, but that it may vest in these municipalities authority to discriminate between the railway companies subject to the exercise of the power, is denied. Indeed, such an attempt, would be a usurpation of authority which can find neither support or justification within the domain of constitutional principles. *This would amount to the taking by legislative enactment, of the property of one citizen for the benefit of another citizen.*

As was said by Justice Field in the *County of Santa Clara v. Southern Pacific Railroad Company*, 18 Fed. 392:

> "It would be difficult to state any principle which would justify the exaction from one of a tax leviable on the interest of another. No power in any state has ever been asserted going to that extent except the power to confiscate. The exaction would not be the taking of property by due process of law. * * * It would be sheer spoliation by arbitrary power."

In his work on Constitutional Limitations, Judge Cooley states the principle he deduces from the adjudication of the courts as follows:

> "Equality of rights, privileges and capacities unquestionably should be the aim of the law, and if special privileges are granted or special burdens or restrictions imposed in any cases, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government."

The plaintiff in error does not *here* complain of an unjust and inequitable apportionment by the city authorities, for by the very terms of the enactment

under consideration, this was *authorized*. It does, however, insist that the state could neither exercise such authority nor delegate its use to a municipality without violating the provisions of the federal constitution and particularly the one last above quoted. In the present instance, however, no attempt was made to apportion the burden or cost among *all* the railway companies concerned, for those not included in the proceeding were intentionally ignored because in the opinion of the city authorities, this was not required. In this connection it may, however, be suggested that the application of the act, as construed by the state courts, to the circumstances of this case, has resulted in imposing upon the plaintiff in error an unjust and unreasonable burden.

It is conceded that there are twenty-two tracks located across the street under the viaduct in question, of which the plaintiff in error owns and operates one only; also that the number of its trains daily operated on its track do not exceed the number of trains operated by either of the other companies upon the remaining tracks and it even falls far short of the number operated by one of them. Consequently, to apportion one-third of the cost of the repairs to it is an outrage both upon law and mathematics. In making this apportionment, it was not necessary to theorize or speculate. It simply involved a matter of calculation. In this view, it is immaterial which one of several methods be used to work out the problem. The result places upon the plaintiff in error an unequal and unjust burden and amounts in fact to the

taking of its property for the benefit of other companies.

Indeed, the learned judge before whom this case was heard in the district court, speaking of the apportionment, said:

"Under this state of facts, it seems to me that the arbitrary requirement of the absolute repair of one-third of the viaduct in question is inequitable."

This result is referred to for the purpose only of illustrating the effect of the unjust and unreasonable discrimination *provided for by the act itself.*

PROPOSITION 2.

Section 48 aforesaid and the proceedings thereunder operate to deprive the plaintiff in error of its property without due process of law and to deny it the equal protection of the laws.

The record herein discloses that under a resolution to that effect, the board of public works prepared the plans and specifications for the repair of the viaduct in controversy, which were submitted to and approved by the mayor and city council as required by section 48; that on January 30, 1894, the city council passed an ordinance in which the Union Pacific company and the respondent were directed to repair the viaduct in accordance with these plans and specifications, the former company to repair the north two-thirds and the latter the south one-third thereof; that afterwards these companies were notified of the action of the city council and ordered to proceed at

once to furnish the necessary repairs. The companies having refused to comply with the order, the defendant in error subsequently brought this suit in the district court of Douglas county, Nebraska, *and upon the hearing the court refused to review the proceedings of the city council with respect to the apportionment or to decide the question as to whether or not it was unreasonable, inequitable and unjust.* No notice whatever was given either of the railway companies of the proceeeding before the city council and *neither of them was given an opportunity for a hearing with respect thereof, either before the city council or in the courts of the state.*

In *Hagar v. Reclamation District*, 11 U. S., 572, the United States supreme court, after referring to the several kinds of taxes and assessments concerning which notice was not required, and the reasons therefor, said:

> "But where a tax is levied on property not specifically but according to its value to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially."

If the duties of the assessor in valuing property for the purpose of general taxation, are judicial, then certainly are those duties performed by boards of commissioners or other special tribunals provided for in acts authorizing the cost of public improvements to be assessed against the property of private citizens, on account of supposed benefits or for other reasons.

Hagar v. Reclamation District, 111 U. S., 572;

Cooley, Taxation, 266;

Burroughs, Taxation, § 102;

Barhyte v. Shepherd, 35 N. Y., 238, 250;

Hassan v. Rochester, 67 Id., 528, 536;

Stuart v. Palmer, 74 Id., 183;

Williams v. Weaver, 75 Id., 30, 33;

Jordan v. Hyatt, 3 Barb., 275, 283;

Ireland v. Rochester, 51 Id., 416, 430, 431;

State v. Jersey City, 24 N. J. L., (4 Zab.) 662, 666;

State v. Morristown, 34 Id., 445;

Griffin v. Mixon, 38 Miss., 434, 437, 438.

The proceedings by the mayor and city council, involves an investigation of facts, and a judgment after a hearing.

In this proceeding the railway companies *only* have a direct pecuniary interest. The state itself can have no such interest, because so long as the proceeding is sanctioned by legal and constitutional principles it is *financially* immaterial to the state whether the burden or cost assigned to either of the companies be more or less than it should be. Nevertheless, the state is vitally concerned, *for herein, if at all, must it find justification and support for the seizure of private property.* It is therefore a judicial proceeding of the highest character, for the judgment involves not only the rights of private property as between the railway companies themselves, but also the authority and jurisdiction of the state to compel the contribution. Such a proceeding, therefore, without notice to those concerned, and without giving them an opportunity

to be heard, violates every maxim and principle of constitutional government.

Stuart v. Palmer, 74 N. Y., 193;

Overing v. Foote, 65 N. Y., 269;

Thomas v. Gain, 35 Mich., 155, 164;

Jordan v. Hyatt, 3 Barb., 275, 283;

State v. Jersey City, 24 N. J. L., 662, 666;

State v. Plainfield, 38 N. J. L., 97;

Patten v. Green, 13 Cal., 325;

Griffin v. Mixon, 38 Miss., 438;

San Mateo Co. v. Railroad Co., 8 Sawy., 238;

Santa Clara Co. v. Railroad Co., 18 Fed. Rep., 385;

Darling v. Gunn, 50 Illinois, 424;

Gatch v. Des Moines, 63 Ia., 718;

Trustees v. Davenport, 65 Id., 633;

Uhlmore v. Baltimore, 21 Atl. Rep., 711;

Boorman v. Santa Barbara, 4 Pac. Rep., 31;

Campbell et al. v. Dwiggins, Treas., 83 Ind., 473;

State v. Newark, 25 N. J. L., 399;

City of St. Louis v. Hill, 22 S. W. Rep., 861;

Bradley v. Irrigation Dist., 68 Fed. Rep., 948, 963.

There are numerous decisions of the United States supreme court in which consideration has been

given to what constitutes due process of law within the meaning of the federal constitution, with respect to the validity of tax laws and tax proceedings. While there can be found no deliverance of that court with respect to that question which in any way controverts or even qualifies the contention of the respondent herein, it should be observed that the present dispute concerns questions of a fundamental character which might not for various reasons, be made the subject of controversy in the federal supreme court in cases involving the validity of taxes under state laws and carried there from the sustaining judgments of state courts solely with reference to whether or not an opportunity for a hearing had been given. The case of *McMillen v. Anderson*, 95 U. S., 37, 24 L. ed., 335, is one of the class alluded to. In that case Anderson was a tax collector for the parish of Carroll in the state of Louisiana; he had seized the property of McMillen and was about to sell it for the payment of his license tax, to which persons, engaged in certain kinds of business were liable to the extent of one hundred dollars. In accordance with the laws of Louisiana, McMillen brought a suit in the proper court of the state, for the trespass and in the same action obtained a temporary injunction against the sale of the property seized, whereupon Anderson answered that the seizure was for taxes due and it was what his duty as collector required him to do. The defense was sustained and judgment given under the statute against McMillen and the sureties on his bond for double the amount of the tax and costs. McMillen thereupon appealed to the supreme court of Louisiana and in his appeal alleged that the

law, under which the proceedings of Anderson were had, was void, because it was in conflict with the constitution of Louisiana and of the United States and specifically opposed to the provision of the fourteenth amendment of the latter, which declares that no state shall deprive any person of life, liberty, or property, without due process of law. The state courts having sustained the law and the proceedings thereunder the suit was subsequently presented to the supreme court of the United States upon the single proposition that the seizure of the McMillen property was without due process of law, because he was denied his day in court. In considering the question presented, the court held that the judgment of the supreme court of Louisiana should be taken as conclusive on all questions mooted in the record except the one relating to the provision of the fourteenth amendment, and proceeded to determine whether or not the laws of the state afforded him due process of law within the meaning of the federal constitution, and as applied to the nature and circumstances of the case. Its judgment was, as stated in the head notes prepared by Justice MILLER, that:

> "A statute which gives the tax payer a right to enjoin its collection and have the validity of the tax decided by a court of justice, is due process of law notwithstanding it requires the party to give security in advance as in other injunction cases."

In that case the taking involved an exercise of the legislative and administrative powers only. The validity of the law and the regularity of the proceedings under it were settled by the state courts. Con-

sequently, speaking with reference to the jurisdiction of the federal authority, nothing could deprive the tax payer of due process of law in that proceeding except the closing of the doors of the court upon him. But as he was in court litigating all of the questions he desired to raise he was not deprived of his property without due process of law. And it may also be observed that it is difficult to perceive how the plaintiff in error was deprived of his property without due process of law even when viewed from the standpoint of the state courts. The authority of the state to lay the tax in dispute could hardly be questioned, for, without doubt, a state may tax its citizens on account of their business or property within its jurisdiction. This power is implied in the very existence of the state itself. It is an attribute of sovereignty and no divorcement can be decreed between them without involving both the social and political fabric in a common destruction. With regard to the validity of the legislation in that controversy, a tax of a certain fixed amount being directly imposed by the legislature upon every person engaged in a certain kind of business, there could be no occasion for a judicial inquiry, either for the purpose of making an apportionment or estimating the benefits to property or business assessed, consequently the only question which could arise under such legislation would be with respect to the execution of it by the officer.

The supreme court of the United States has, however, upon several occasions, explored the meaning of due process of law as applied to cases in which questions similar to those under consideration were pre-

sented. In the case of *Davidson v. The Board of Administrators of New Orleans*, 96 U. S., 97, the assessment of the real estate of the plaintiff in error in the city of New Orleans for draining the swamps of that city, was resisted in the state courts and was brought to the federal supreme court by writ of error, on the ground that the proceeding deprived the owner of his property without due process of law. The court held in that case that when such a burden or the fixing of a tax or assessment by the statute of the state is required to be submitted to a court of justice, *before it becomes effectual* with notice to the owners, the right on their part to appear and contest the assessment is due process of law within the meaning of the constitution. In speaking of the necessity for a hearing the court stated that:

> "*Before the assessment in question could be collected or become effectual*, the statute required that the tabulated assessment should be filed in the proper district court of the state; that personal service of notice for a reasonable length of time should be served on all owners who are known or within reach of the process and due advertisement made as to those who were unknown or could not be found. This was complied with and the party complaining here appeared and had a full and fair hearing in the court in the first instance and afterwards in the supreme court. If this be not due process of law, then the words can have no definite meaning as used in the constitution.

In *Hagar v. Reclamation District* 111 U. S., 701, 715, it appears that in 1868 the legislature of California passed an act, by virtue of which a general system was established for reclaiming swamps and overflowed salt marsh and tide lands in the state,

thus fitting them for cultivation. One of the provisions of the act required the supervisors, at a certain stage of the proceedings, to appoint three commisioners who were to jointly view and assess upon each acre to be reclaimed or benefited, a tax proportionate to the whole expense, and to the benefits which would result from the works. This tax was to be collected and paid into the county treasury, and placed to the credit of the district, etc. The commissioners were also required to make a list of the amounts due from each owner of land in the district and of the amount assessed against the unsold land and file the same with the treasurer of the county in which the lands were situated. The lists thus prepared were to remain in the office of the treasurer for thirty days, or longer if so ordered by the trustees; during which time any person could pay the treasurer the amount assessed against his land, but if at the end of thirty days or the extended time, the tax had not been paid, the treasurer was to transmit the list to the district attorney, *who was to proceed at once against the delinquents in the manner provided by law for the collection of state and county taxes.* The appellant having refused to pay the tax assessed against his property, suit was brought by the district attorney against him in the proper court and thence removed to the circuit court of the United States. One of the contentions of the appellant was that in making the assessment upon his property no notice was given nor an opportunity afforded him, to be heard respecting it, the law containing no provision for such notice or hearing. It was, therefore, claimed that for want of such notice and

hearing, the proceeding in which his land was assessed, amounted to a taking of his property without due process of law.

This contention the court, however, refused to sanction and assigned in support of its judgment the same reasons urged in its decison in *Davidson v. New Orleans*, 96 U. S., 97. It said:

"The assessment under consideration could, by the law of California, be enforced *only by legal proceedings*, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation, assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits and, of course to their validity it is essential that notice be given to the taxpayer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. *Reclamation District No. 108 vs. Evans*, 61 Cal., 104. If property, taken upon an assessment, *which can only be enforced in this way*, be not taken by due process of law, then, as said by Mr. Justice MILLER, in the New Orleans case, these words, as used in the constitution, can have no definite meaning. The numerous decisions cited by counsel, some of which are given in the note, as to the necessity of notice and of opportunity of being heard are all satisfied where a hearing in court is thus allowed.

In the case of *Bradley et al. v. Fallbrook Irrigation Dist. et al.* 68 Fed., 948, 966, the circumstances and decision of the court are briefly given in one of the head notes as follows:

"A state statute providing for the creation of irrigation districts

of such extent as to comprise lands susceptible of one mode of irrigation, from a common source and by the same system of works, upon the petition of 50 or a majority of the land owners therein, confirmed by a vote of two-thirds of the qualified voters residing within the district, with power to issue bonds, levy assessments to pay the same, and to condemn lands for the construction of canals, works, etc., cannot be sustained under the power to make assessments for local improvements, where the county supervisors to whom the petition is to be addressed have no authority to adjudicate upon the merits thereof, and no opportunity is given to landowners to contest the validity of the petition, or the proceedings thereunder, which may finally result in the taking of private property. Such a statute is invalid as authorizing the taking of private property without due process of law; nor can this fatal defect in the foundation of the proceedings, be cured by the fact that each landowner is entitled to be heard in determining the valuation of his land for purposes of assessment, or by the fact that, by an amendatory act (St. Cal., 1889, 212) the board of directors of an irrigation district are, *in their discretion*, authorized to institute a special proceeding in the courts to determine the validity of the proceedings, previously had, organizing the district, on publication of notice, and with the right in any person interested to appear and contest the same."

These decisions of the federal courts, and there are numerous others, make clear and emphatic that when a proceeding by which private property is to be taken for public use requires an investigation and judgment concerning the existence of certain facts and conditions essential to further proceedings, or in other words, necessary to the jurisdiction and authority of the state or municipal body, notice thereof

must be given the parties interested and an opportunity afforded them to be heard in their own behalf. It may not, however, be absolutely necessary that the hearing in a tax proceeding relating to special assessments shall be had at any particular stage thereof so that it be had *before it becomes effective*, still, if regard be had to established usage or to the nature of the proceeding and the object in view, it would seem to be the part of legislative wisdom as well as a matter of public necessity that a hearing should be afforded at *the time of the inquiry and before judgment is had.* Be this as it may, there can be no doubt that a hearing must be afforded *before the proceeding of which the judicial inquiry is a necessary part, becomes effective. If, before such hearing it becomes, or may become operative even for an hour and upon the slightest fraction of the property rights of the citizen it would amount to a taking of property without due process of law.* The legislative enactments referred to in the Davidson and Hagar cases made judicial proceedings *absolutely essential* to the seizure of property under them. No property could be taken except by virtue of an order or process issued in a proceeding instituted for that purpose in the courts of the state. Thus were the property owners assured of their rights to be heard not at the *mere pleasure* of the state or of the municipal body, but as a matter of absolute *right or necessity*, for after refusal upon their part the state or the municipality had no choice but either to *abandon* the tax altogether *or to institute proceedings in the courts to collect it.*

In *The State v. Newark*, 25 N. J. L., 399, *supra*,

an attempt was made to collect certain assessments imposed upon private property on account of supposed benefits, the same to be applied toward the construction of sewers in Newark, New Jersey. The assessment was made by the muncipal corporation, no notice thereof being given to those upon whom it was made to enable them to be heard in opposition to, or in review thereof. In its opinion the court states:

"*Second.* The prosecutors had no notice of these proceedings, except notice to pay their assessments, no opportunity to be heard before the commissioners as to the propriety of being assessed at all, or as to the amount of the assessment, nor of being heard before the counsel, or any other appellate tribunal, in opposition to or review of the assessments, the reports of assessments having been confirmed by the council at the same meeting they were presented. This is contrary to all our ideas of natural justice, and contrary to the well settled legal principle, that 'whenever a court, or any person acting under legal authority, is to act judicially, or to exercise a discretion in a matter affecting the rights of another, the party thus to be affected is to have reasonable notice of the time and place when and where such act is to be done to the end that he may be heard in defense, or for the protection of those rights. This is the language of Ch. J. HORNBLOWER in delivering the opinion of the court in *The New Jersey Turnpike Co. v. Hall et al.* 2 Harr., 337. He says that no principle or rule of action is better settled at the common law than this, and he is fully sustained by the following, among other cases that might be cited:

Hess et al. v. Cole 3 Zab., 116;

Coster et al. v. New Jersey Railroad Co., 3 Zab, 227;

Vail v. Morris & Essex Railroad Co., 1 Zab., 191;

Youngs v. Overseers, &c., 2 Green, 517;

Matter of Flatbush avenue, 1 Barb., 286;

Jordan v. Hyatt et al., 3 Barb., 275;

Owners, &c., v. Mayor, &c., of Albany, 15 Wend., 374;

Vantilburgh v. Shann, et al, 4 Zab.;

The State (Mann, prosecutor,) *v. Jersey City*, already cited."

In *Stuart v. Palmer*, 74 N. Y., 183, the act of the legislature authorized the commissioners therein provided for to ascertain what land within the district of assessment was benefited and to apportion and assess the amount required upon such land in proportion to the benefits. The assessment when made was *to be a lien upon the land*, and its payment could be enforced by the sale thereof. No notice was required to the owners of the land to be benefited and assessed. The court speaking with reference to the questions under consideration, said:

"I am of the opinion that the constitution sanctions no law imposing such an assessment *without a notice to, or a hearing, or an opportunity of a hearing, by the owners of the property* to be assessed. It is not enough that the owners may by chance have notice, or that they as a matter of favor have a hearing. *The law must require notice to them or give them a right to a hearing and an opportunity to be heard.* It matters not upon the question of the constitutionality of such a law that the assessment has in fact been fairly apportioned. The constitutionality and validity of the law is to be decided not by what has been done under it *but what may by its authority be done.* The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice."

The state has made no attempt to impose by di-

rect legislative enactment any duty whatever upon railway companies with respect to the construction and maintenance of viaducts.

It has merely delegated to cities of the metropolitan class authority, under certain circumstances, to do so. So far, therefore, as the construction and maintenance of viaducts can be compelled by the exercise of legislative and administrative powers, the city may proceed without notice or an opportunity for a hearing being given, provided the right to contest the validity of the law and the proceedings under it, in the courts of the state, be not denied. This may possibly be the case where only a single railway company is interested, for then, if the requirements of the act be observed, the taking would involve only the exercise of legislative power by the legislatures of the state and of the city. There would be no occasion for the exercise of judicial authority. But when two or more railway companies are concerned, the legislative power is *exhausted* when the location, character and cost of the viaduct are determined by the mayor and city council. The very next step involves a *judicial inquiry* into circumstances and conditions for the purpose of ascertaining the share of each company in the *common responsibility* for the very danger in which originates the necessity and power of the municipality to further proceed. This determination practically fixes the proportion of the common burden or costs each company should carry. In this inquiry and judgment therefore is fixed the *foundation of the proceeding by which* private property is to be taken for

puplic use. By this means only, can the state or the city acquire any power or jurisdiction whatever over the property of the railway companies for the purposes aforesaid.

Except when necessary to the moral or physical safety of the community the state has no right or power to take private property for any purpose without compensation to the owner thereof. As to taxes for general or local purposes, the taxpayers are presumed as a matter of law, to receive compensation for the burdens thus imposed in the protection and benefits afforded by the governments, general or local, under which they live. As to local improvements, they may be authorized and the expense thereof assessed upon the lands benefited, but in such cases benefits are not to be presumed as a matter of law, but established as a matter of fact. The *legislature* cannot determine whether or not public improvements will *specially* benefit certain property. This can be done only through the exercise of *judicial power*, and however important the exercise of legislative and administrative powers may be to the taking of private property it cannot be accomplished without also including the use of the judicial power.

The language of the court in *Stuart v. Parmer* is apt:

> "It must be conceded that property cannot be taken by the right of eminent domain, without some notice to the owner, or some opportunity on the part of the owner, at some stage of the proceeding, to be heard, as to the compensation to be awarded him. An act of the legislature, arbitrarily taking property for the public good, and fix-

ing the compensation to be paid could not be upheld. There would in such case be the absence of that 'due process of law' which both the federal and state constitutions guarantee to every citizen. Can it be, when the public takes land for a public highway, the owners thereof are entitled to a hearing as to the compensation which they are to receive, and yet the lands on both sides of the highway may be assessed to pay such compensation to their entire value, without any opportunity on the part of the owners to be heard?

"The legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing. It is a rule founded on the first principles of natural justice older than written constitutions, *that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard in defense of his rights*, and the constitutional provision that no person shall be deprived of these 'without due process of law' has its foundation in this rule. This provision is the most important guaranty of personal rights to be found in the federal constitution. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrarily be deprived of his life, liberty or property. This the legislature cannot do or authorize to be done. 'Due process of law,' is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceedings be judicial, administrative, or executive in its nature. *Weimer v. Brueinbury*, 30 Mich., 201. This great guaranty is always and everywhere present to protect the citizen against arbitrary interference with these sacred rights."

The principle that a citizen shall not be deprived of his property without an opportunity to be heard in defense of his rights applies where private property

is to be taken through the exercise of the police power. If a citizen may be compelled to surrender a portion of his property to redeem a community from a danger, *he with other citizens has created*, the amount thus required of him cannot exceed his contribution to such danger without reducing, by the amount of such excess, the burdens of the other citizens. Such an exaction would, in the language of Mr. Justice FIELD, be "sheer spoilation by arbitrary power." The same reason therefore which would require an apportionment in the matter of special benefits would operate in cases involving the exercise of the police power.

Against the iniquity of unequal and unjust public burdens the people have chosen to protect themselves through their governments and it is recognized as a principle of general application that all forms of taxation and assessments under free governments must be as nearly as practicable uniform and equal. As said in *Stewart v. Palmer*, "taxation and assessment imply apportionment; each person must share the burdens of taxation and assessment *equally* with all others in like situation."

Assessments for local improvements can be justified only upon the theory that the lands upon which they are laid, are especially benefited by the improvements for which they are laid and hence ought to bear the burden rather than property generally, and if a law should authorize such assessments to be laid without reference to benefits it would either take property for the public good without compensation or it would take property from one person for the direct

benefit of another and in either aspect it would be unconstitutional.

Kirby v. Shaw, 19 Penn., 258;

Schenley v. Commonwealth, 36 Id., 29;

McGonigle v. Alleghany City, 44 Id., 118;

In the matter of Washington Avenue, 69 Id., 360;

Patterson v. Society, etc., 24 N. J., 385;

Tide-water Co. v. Coster, 18 N. J., Eq., 519;

In the matter of the Drainage of Lands, 35 N. J., 497;

St. John v. East St. Louis, 50 Ill., 92;

Lee v. Ruggles, 62 Ind., 427;

In the matter of Albany Street, 11 Wend., 149;

Litchfield v. Vernon, 41 N. Y., 123.

So with regard to assessments for local improvements necessary to secure the safety of the community, they are to be laid, *if at all*, upon the individuals creating such necessity, and a law authorizing them against any number *less than all concerned*, would either take property for the public good without compensation, or from one person for the direct benefit of another and in either aspect, it would be unconstitutional.

If, for such purposes private property cannot be taken without giving the proprietors thereof an opportunity to be heard, it may be asked if this valuable constitutional right is not secured to them by the very terms of the act in question. The provisions in

that respect are: that if the railway companies shall neglect or refuse to construct or repair the viaducts within the time and manner required by the mayor and council, such failure or refusal shall constitute a misdemeanor and upon conviction the companies shall each be fined $100, and each day of such failure and neglect shall be deemed a separate and distinct offense; also, the companies may be compelled by mandamus or other appropriate proceeding, to construct or repair these viaducts, or the city may proceed to construct or repair them by contract, or in any other manner, it may by ordinance provide for, and assess the cost thereof against the property of the railroad companies required to erect or repair the same, *which cost shall be a valid and subsisting lien against such property and also a legal indebtedness of said companies, in favor of the city, which may be enforced and collected by a suit in court.*

Upon the refusal of the railway companies to perform the duties required, it is entirely *optional* with the city whether it shall enforce the same by suit or proceed by contract or otherwise, to construct or repair the viaducts. Should it elect to do the latter, the companies would thereby become indebted to the city to the amount of the cost thereof, which would by operation of the statute, become a lien upon their properties, and whether mandamus proceedings be instituted or the work undertaken by the city, the act becomes *immediately effective*, at least to the extent of making each day's neglect or refusal a misdemeanor, for which all of the companies may be prosecuted and upon conviction thereof, fined $100. The

mayor and city council may, therefore, *at their election*, authorize an apportionment which may create a lien upon the properties of the railway companies concerned and also deprive them of the enjoyment of their liberty to the extent of loading it with a penalty of $100 a day, and this without any possible opportunity for a hearing. The constitutional assurance that a citizen shall not be deprived of his life, liberty or property without an opportunity to be heard is the most important guaranty contained in the federal and state constitutions. In this the citizen has an *absolute right which cannot be made to depend upon the caprice or interest of a municipality.*

Speaking with reference to this question, Ross, Circuit Judge, in *Bradley v. Fallbrook Irrigation Dist.*, 68 Fed. Rep., 948, said:

> "In the present case, however, as has been shown, the owner whose property is authorized to be taken, is not afforded any opportunity whatever, at any time or place, before any board or tribunal, to question the sufficiency of the very thing that lies at the foundation of the whole proceedings. This vital objection to the legislation in question is in no manner answered by the fact that, by a supplemental act of the legislature of California, approved March 16, 1889, (St. Cal., 1889, pp. 212, 213) the board of directors of any irrigation district is authorized to commence a special proceeding in a superior court of the county in which the lands or some portion thereof are situated, in which, after the publication of notice of the proceeding, any person interested may come in and contest the legality and validity of each and all of the proceedings for the organization of said district under the provision of said act, from and including the petition for the organization of the district, and all other proceedings

which may affect the legality or validity of said bonds and the order for the sale and the sale thereof. *Such a proceeding may or may not be instituted by the board of directors of the district*, and was not instituted on the present instance, so far as appears from the bill. *No man's constitutional rights can depend upon an option which may or may not be exercised by another.*"

That a proceeding which creates an indebtedness against private property and secures payment by a lien thereon amounts to a taking of property within the terms of the constitutional guaranty, can admit of no doubt. In *Stuart v. Palmer*, it was said:

"No case it is believed, can be found in which it was decided that this constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta of judges, that their attention was not called to it, or that they lost sight of it, in the cases which they were considering. It has sometimes been intimated that a citizen is not deprived of his property within the meaning of this constitutional provision by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced not only against the real estate upon which it is a lien; but as in this case against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense as the judgment-debtor is deprived of his by judgment."

In *Brady v. King et al.*, 53 Cal., 45, an attempt was made by the legislature to ratify and confirm certain defective ordinances by which it was attempted to confer upon a board of supervisors power

or jurisdiction to order certain street work done. It was held that the act was in violation of the constitution of the state and therefore void. The court said:

"As the attempted assessment was absolutely void, the act of the legislature was an attempt to levy a contribution within a certain district, and to declare that each lot named in the original roll should pay a sum arbitrarily fixed. This would be to create a lien on defendant's real estate, which, if the law were valid, the courts would be compelled to enforce.

"If this can be done, the legislature may take the property of the citizen without any legal process, for there can be no difference between *taking the property directly and imposing a lien upon it.* But no person 'can be deprived of life, liberty or property without due process of law.' (Constitution, art. 1, sec. 8).

"The act of the legislature is an attempt, at best, to levy an assessment within the city. The legislature has no power to levy such assessment. (*Taylor v. Palmer*, 31 Cal., 240; *People v. Lynch, supra*)."

It is, however, needless to multiply arguments or authorities. It can hardly be possible that an act which, while encumbering the property of a citizen with an indebtedness—the equivalent of a fortune—and imposing upon his freedom an arbitrary tax of $100 a day, is so framed as to practically deny him all appeal to the courts to secure him in the possession and enjoyment of his constitutional rights, can receive the sanction of the courts of the people whose institutions constitute an absolute pledge against the exactions of arbitrary power and whose vocabulary has long since been exhausted in proclaiming the inviolability of personal rights.

Even if it could be supposed that the provision

giving the city the right at its option, to compel by writ of mandamus, the construction or maintenance of viaducts, as qualified by the other provisions of the section, meets the constitutional requirements in that behalf, still, so far as the present suit is concerned, the *plaintiff in error has been absolutely denied a hearing or determination with respect to the apportionment in question.* This suit is brought here upon a writ of error for the purpose of reviewing the decision of the state supreme court affirming the judgment of the trial court, in which the judge, though finding as a matter of fact that the apportionment was inequitable and unjust, refused to review the action of the mayor and city council in making the same. A reference to the concluding paragraph of the printed opinion of the trial judge will perhaps afford the clearest demonstration of this statement. Rec. 33.

> "Under this state of facts it seems to me that the arbitrary requirement of the absolute repair of one-third of the viaduct in question is inequitable, but the power to so require is vested by the legislature absolutely in the city council, yet the supreme court of this state, in the case of *Hanscom v. Omaha*, 11 Neb., 42, refused to sanction the absolute authority of the city council upon a question of like import. I do not now intend to decide whether the requirement in behalf of the city, is equitable and just or not. So far as I may, and make this order final, I desire to reserve that question for future consideration, and if, in the judment of the supreme court, the solution arrived at by me is correct, then the question of determining the proper proportion to be borne by this respondent, in view of the above facts, will be further considered and ultimately determined. With this simple expression of what

> I deem should be the ultimate result of this case, the writ of mandamus will issue as prayed."

The solution of this question, vital to the authority and jurisdiction of the city and involving the constitutional rights of the plaintiff in error, is thus expressly reserved, notwithstanding the finding of fact by the court, until after the viaduct is repaired.

Even if the court desired to do so, it is difficult to understand how, upon a hearing of an application of a writ of mandamus and in the absence of necessary parties, it could have reviewed the action of the city authorities and reapportioned the burdens in accordance with the requirements of equity and the law, for in the distribution of a common burden, the share of one must necessarily depend upon the share of the others and the judgment of a court to be final and conclusive, should be binding upon all concerned.

In this connection, the attention of the court is particularly called to the following provision of the act under consideration;

> "It shall be the duty of any railroad company or companies upon being required as herein provided, to erect, construct, reconstruct or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, reconstruct or repair the same, *and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars, and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense.* * * * " (Rec. p. 10.)

A notice was served on the plaintiff in error in

accordance with the requirements of the provision just quoted, in January, 1894, by delivering to the company a certified copy of ordinance number 3752. The requirements of section 2 thereof, so far as they affect the plaintiff in error, are as follows; (Rec. p. 10).

"And the Chicago, Burlington and Quincy Railroad Company, grantee and successor to the Burlington and Missouri River Railroad Company in Nebraska, and the Omaha and Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct commencing at the south end thereof and extending northward to a distance of one-third of the entire length of said viaduct. The said repairs to be made in accordance with said plans and specifications and to be under the supervision of the city engineer. *The said repairs to be commenced without unnecessary delay and fully completed as herein required, within ninety days from the passage and approval of this ordinance.*" (Rec. p. 11.)

It is obvious, therefore, that by the terms of section 48 and the provisions of the ordinance and notice just quoted, the plaintiff in error will be, ere a final judgment is reached in this suit, delinquent by a period of three years and liable to fines and penalties in an amount exceeding $100,000, and this enormous fine can be imposed upon it as a penalty for the delay occasioned by its appeal to the courts, for security against the invasion of rights guaranteed to it by the provisions of the federal constitution.

To the objection that the act authorized the appropriation of the property of the plaintiff in error without due process of law, the state supreme court in its opinion (rec. p. 84,) declares that:

"It does not authorize the appropriation of the respondent's

property without due process of law in a constitutional sense, since the latter is able to invoke the equal protection of the law by any appropriate proceeding and because it did in fact put in issue by the answer, both the validity of the ordinance and the reasonableness of the amount apportioned to it for the repair of the viaduct in question."

It is, however, submitted that the right to litigate in the courts should be as free to the plaintiff in error as to any other citizen and that when it is denied a hearing involving a few hundred or a few thousand dollars, unless it is willing to assume the enormous risk of fines and penalties which may in the event of defeat aggregate two hundred thousand dollars, it cannot be said that the courts are open to it on equal terms with other citizens. Such enormous penalties close the doors of the courts, almost as effectually as if they were closed by express provision of the statute.

Upon these considerations, therefore, it is respectfully submitted:

1. That the act itself is void as authorizing the taking of private property for public use without affording the owners thereof an opportunity for a hearing.

2. That in this instance, the proceeding by the city is an attempt to appropriate the property of plaintiff in error for public use without affording it a hearing.

3. That the plaintiff in error has been denied a hearing by the courts as to the question respecting the apportionment.

PROPOSITION 4.

The enforcement of the provisions of section 48 and of city ordinance No. 3752 making it effective against the plaintiff in error, will impair the obligations of the contract under which the viaduct in question was constructed, and will also impair the obligations of the charter contract under which the Omaha & Southwestern Railroad Company was organized and by virtue of which it located, in accordance with the provisions of Ordinance No. 729, its track across Eleventh street.

The viaduct in question was built under a contract authorized by the act of 1885, and executed on the 1st day of February, 1886, between the city of Omaha, the Union Pacific Railway Company and the plaintiff in error, these companies at that time owning and operating the tracks across this street. (Rec. p. 22).

By the terms of this agreement, the railroad companies were to contribute three-fifths of the entire cost of constructing the viaduct along Eleventh street and three-fifths of the damages to abutting property on account of the construction thereof, not otherwise provided for by waivers or private contributions, the entire cost and damages not to exceed the sum of $90,000.

Under the act of 1885, and subsisting laws, general and special, cities of the first class were authorized, upon certain conditions, to build and maintain viaducts upon streets occupied by railroad tracks. One of these conditions related to con-

struction only, and was that the railroad companies owning the tracks aforesaid should furnish three-fifths of the cost of the viaduct and three-fifths of the damages resulting to abutting property owners from the construction thereof. Hence an arrangement, pursuant to the act aforesaid, amounted in fact to an agreement between the city and the contracting railroad companies, by which the former was to receive a large pecuniary assistance in the performance of the duties and obligations devolving upon it as a municipality, and the latter a valuable aid in the conduct of its business.

If the state had the power to authorize contracts for the construction of viaducts through private aid contributed on account of and solely for the special pecuniary advantage which the contributor would derive therefrom, then clearly the city would be bound to make good its obligations whether derived through the express terms of the contract or implied from the public laws subsisting at the time of its execution.

The duty of cities with respect to maintaining their streets has been recognized and affirmed by the supreme court of Nebraska for many years. Of the numerous decisions in that behalf, reference is made to the following:

City of Lincoln v. Walker, 18 Neb., 244;
Plattsmouth v. Mitchell, 20 Id., 228;
Foxworthy v. Hastings, 25 Id., 133;
City of Lincoln v. Smith, 28 Id., 762;

Kinney v. Tekamah, 30 Id., 605;

City of Omaha v. Randolph, 30 Id., 699.

A viaduct is unquestionably a part of the street upon which it is located. It is, in fact, an elevated street, established and used for street purposes and substituted for the part of the original street under it as a matter of convenience and safety. The use alone of the viaduct by the public for street purposes would impose upon the city the obligation to maintain it in safe condition for such use.

Plattsmouth v. Mitchell, 20 Neb., 228;

Kinney v. Tekamah, 30 Id., 605;

Foxworthy v. Hastings, 25 Id., 133.

Although no express stipulation to this effect was made in the contract, it was certainly within the contemplation of the parties that the viaduct therein provided for, should be built in accordance with the provisions of the act of 1885. It is equally certain that it was within the contemplation of the parties that the viaduct should be maintained. It would have been an act of folly for these parties to join in a contract involving the expenditure of large sums of money for the purpose of relieving themselves of the inconvenience and dangers incident to the joint use of the street, by providing for the construction of a viaduct thereon without also intending to provide for its maintenance, but the obligation to maintain could not be imposed upon the railway companies except by express provision.

But no such provision was made, hence, the city being bound under the laws, general and special, sub-

sisting at the time, to maintain all streets or parts of streets used by the public or which might be from time to time established, the duty to maintain would be necessarily assumed by it, as one of the implied obligations of the contract.

It is a universal rule that every contract is made with a view to the laws extant at the place of execution which become a part of it and by the aid of which it is to be read and expounded.

Edwards v. Kearzey, 96 U. S., 595;

Von Hoffman v. City of Quincy, 4 Wall., 535.

In the latter case, the city of Quincy had issued bonds under certain acts of the legislature which authorized the levy of a special tax to pay the interest as it fell due. Subsequently, in 1863, a law was passed restricting the power of taxation. The relator in the case had obtained a judgment on interest coupons and had applied for a mandamus to compel the levy of a tax to pay the same. The opinion of the court was delivered by Mr. Justice Swayne, who speaking with reference to the laws being a part of the contract, said:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. Illustrations of this proposition are found, in the obligation of the debtor to pay interest after the maturity of the debt, where the contract is silent; in the liability of the drawer of a protested bill to pay exchange and damages, and in the

right of the drawer and endorser to require proof of demand and notice. These are as much incidents and conditions of the contract as if they rested upon the basis of a distinct agreement."

Green v. Biddle, 8 Wheat., 92;

Bronson v. Kinzie, 1 How., 319;

McCracken v. Hayward, 2 Id., 612;

People v. Bond, 10 Cal., 570;

Ogden v. Saunders, 12 Wheat., 231.

It was also held in *VonHoffman v. City of Quincy*, that where a state authorizes a municipal corporation to contract and exercise the power of local taxation, this power cannot be withdrawn until the contract is satisfied. Speaking upon this phase of the case, Mr. Justice Swayne used the following language:

"When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by that act, will be insufficient, and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired, and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not. For every beneficial purpose it may be said not to exist. It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. *New Jersey v. Wilson*, 7 Cranch, 166; *Dodge v. Woolsey*, 18 How., 331; *State Bank of Ohio v. Knoop*, 16 Id., 369. It is equally clear that

where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation in such cases are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. *People v. Bell*, 10 Cal., 570; *Dominick v. Sayer*, 3 Sandf., 555.

"The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right —of no practical value—and render the protection of the constitution a shadow and a delusion."

It may be insisted that inasmuch as the subject matter of the contract relates to the construction and maintenance of viaducts, the railroad company cannot have such a special use thereof as to confer upon it a property right or interest within the meaning of the constitutional provisions guaranteeing the rights of private property. There can, however, be little doubt but what a corporation may have, with respect to a viaduct as with respect to a street, rights of property arising out of the peculiar relation which it sustains to its property; a right, in other words, not shared by the public and which ought to be and is as sacred from legislative invasion as is its right to the property itself.

Story Case, 90 N. Y., 122;

Lahr Case, 104 N. Y., 268;

Warren v. Lyons, 22 Ia., 351.

There are in law as well as in fact two sides to a viaduct, the *upper* and the *lower* side. The use of the public is of the *upper* side and in such use a railroad company may participate as one of the public. The use of the *lower* side however is a *special* and *particular* use, being in the railroad company over whose lines it may be located. This use is constant and important. Indeed, the greater the public use the more valuable the private use. Such use facilitates the operation of the trains across the streets. It relieves the railroad companies of the necessity of maintaining flagmen, watchmen and gates and also of the danger of accidents which may result in injury, either to persons or property. For these reasons viaducts are of special pecuniary value to railroad companies. Indeed, the authority of the state to burden railroad companies, over whose tracks viaducts are located, with their maintenance, is justified upon the ground that such companies are particularly and specially benefited by them. It follows, therefore, that where a viaduct has been constructed under a contract otherwise valid, voluntarily entered into between railroad companies on the one hand and a municipality on the other, by which the former has contributed a large portion of the cost and damages involved, in consideration of its being built and maintained by the latter, the companies thereby acquire a *vested right* not only in the viaduct but in the maintenance thereof according to the contract. Every reason

which can be urged to justify the application of this principle in case of an abutting lot owner, can be urged with greater force by the railroad companies with respect to a viaduct built under such a contract. There is and can be no reason why the legislative power of the state should be more absolute in one than in the other case. It is possible that the exercies of such powers might be *unlimited* but for the rights of private property.

There is nothing in the nature of the contract or in the obligations it imposes, which places it under the ban of public policy or in any degree whatsoever restricts either the state or the municipality from the legitimate exercise of their legislative powers over public streets.

Can it be said, for instance, that a contract is against public policy because it provides for the maintenance of a viaduct used as a part of a public street, so as to make it convenient and safe for the use of the public for street purposes, especially where it calls for an improvement universally recognized as the best and in the majority of cases, the only means to secure the result? The mere statement of the proposition involves its refutation.

Neither does the contract in the least restrict the state or the municipality from the legitimate exercise of its legislative control of streets. It is universally conceded that the legislature of the state represents the general public and possesses full and paramount

authority over all public ways including the streets of cities, and that the only restrictions imposed upon the exercise thereof are contained either in the federal or state constitutions, or incidentally imposed by those constitutional provisions which guard private property against the invasions of the state. Subject to these restrictions the legislative control of highways and streets, is practically unlimited, both as to means and extent. In the exercise thereof it is the end in view that weighs. To establish highways and streets and to provide for their maintenance and use are the essential objects. The question of means is a matter of legislative discretion, to be exercised with reference to the necessities of the community and the rights of private property.

The act of 1885 was intended and designed by the legislature to enable cities of the first class to provide for the safe use of its public streets occupied by railroad tracks by means of viaducts to be constructed and maintained under contracts between them and the railroad companies owning and operating such tracks.

As to how the street should be made safe and the cost and expenses thereof be borne, was a matter purely with the discretion of the legislature, and if in its judgment it was deemed wise to authorize certain municipalities of the state to enter into contracts with private citizens for such improvements, it certainly had the constitutional power to do so, and such contracts when executed would have the same force and effect as if made by the state itself.

The authority of the state to enter into contracts

which operate even to restrain the exercise of some of its most important powers, has been sustained by the supreme court of the United States in a large number of cases. In this connection it will be sufficient to quote from the opinion of Justice HARLAN in the case of *New Orleans Gas Light Co. v. Louisiana Light, etc., Mfg., Co.* 115 U. S., 650. After briefly noticing the adjudications in the cases of

Slaughter House Cases, 16 Wall., 62;

Stone v. Mississippi, 101 U. S., 814;

Bridge Proprietors v. Hoboken Co., 1 Wall., 116;

The Binghampton Bridge, 3 Wall., 51;

West River Bridge Co. v. Dix, 6 How., 531;

Pontchartrain R. R. Co. v. Orleans Navigation Co., 15 La., 413;

Crescent City Gas Light Co. v. New Orleans Gas Light Co., 27 La. Ann., 147;

he says:

"Numerous other cases could be cited as establishing the doctrine that the state may, *by contract*, restrict the exercise of some of its *most important powers*. We particularly refer to those in which it is held that an exemption from taxation for a valuable consideration at the time advanced or for services to be thereafter performed, constitutes a contract within the meaning of the constitution."

Asylum v. New Orleans, 105 U. S., 368;

Home of the Friendless, 8 Wall., 430;

New Jersey v. Wilson, 7 Cranch., 166;

Bank of Ohio v. Knoop, 16 How., 376;

Gordon v. Appeal Tax Court, 3 Id., 133;
Wilmington R. R. v. Reid, 13 Wall., 266;
Humphrey v. Pegues, 16 Id., 248, 249;
Farrington v. Tenn., 95 U. S. 689.

Continuing, the court say:

"If the state can, by contract, restrict the exercise of her power to construct and maintain highways, bridges and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad withing certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations, it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the state might undertake to perform either herself or by subordinate municipal agencies.

"The former adjudications of this court, do not declare any different doctrine, or justify the conclusion for which the defendant contends."

But the contract in question does not restrain the state or municipality in the exercise of any of its powers or control over public streets or over the viaduct in question. *It is in and of itself, an exercise of such power or control, and not in restraint of it. It secures the public safety and not the continuance of the public danger.*

The contract, being made by competent author-

ity, is therefore within the jurisdiction and protection of the federal government, unless subject to either the reserved power or to the police power of the state.

To repeat what was said by Chief Justice TANEY in *Ohio Life Insurance, etc., Company v. DeBolt*, 16 How., 428:

> "Yet if the contract (referring to the contract in that suit) was within the scope of the authority conferred by the constitution of the state, it is, like any other contract made by competent authority, binding upon the party; nor can the people or their representative, by any act of theirs, afterwards impair its obligation. When the contract is made the constitution of the United States acts upon it and declares that it shall not be impaired and makes it the duty of this court to carry it into execution. That duty must be performed."

It is, however, conceded that a state may pass laws impairing contract obligations, first, where the right to alter or annul the same has been expressly reserved; second, where the contract provides for a business which has become detrimental to the public health or morals.

In the one case the act of the legislature may be said to be an exercise of the reversed right of the state and in the other an exercise of the police power of the state. In either case, the contract is excepted from the jurisdiction and protection of the national government.

The constitution and laws of the state subsisting at the time of the organization of the Omaha and Southwestern Railroad Company, together with the provisions of the act under which it was incorporated,

unquestionably constitute a contract between the state and that company. It will not be pretended that at the time of its incorporation, any right whatever was reserved to the state to alter, amend or repeal its charter. Having, therefore, failed to reserve such right, the state cannot impose upon the company any new or additional obligations than those provided for by its charter. Even had such right been reserved it could not be exercised to impair the obligations of an executed contract such as the one under consideration.

In *Ward v. Farwell*, 97 Ill., 593, the supreme court of Illinois, speaking with reference to the obligation of charter contracts, declared that the granting of a charter by the state to a private corporation creates a contract between the state and the incorporators of such company and is no longer an open question and it will therefore be a useless occupation of time to reconsider the reasons by which the conclusion is reached. It follows, therefore, where the right to do so has not been reserved in the grant, that it is not within the power of the legislature, after the acceptance of such charter, to engraft upon it any new terms or provisions without the concurrence or assent of the corporation. See also:

Coast Line Railroad v. Savannah, 30 Fed., 640.

City of Kansas v. Corrigan, 85 Mo., 263;

I. C. R. R. Co. v. Bloomington, 76 Ill., 447.

There are many cases in which states have altered or annulled contracts or imposed new burdens

upon corporations not provided for in their charter or acts of incorporation, but in every instance the state has reserved the right to do this.

Sioux City St. Ry. Co. v. Sioux City, 138 U. S., 640;

Peake v. C. & N. R. R. Co., 94 U. S., 194;

Boston Beer Co. v. Mass., 97 U. S., 25.

The principle sustained by these causes may be illustrated by the Sioux City case, in which the facts were that the Street Railway Company was incorporated December, 1893, at the time the statute was in force reserving to the state the right at any time thereafter to alter or amend the articles of incorporation as might be deemed necessary for the public good. Immediately upon its organization the railway company acquired from the city by ordinance the right to lay and operate its tracks through the streets of the city, subject however to the provision thereof requiring it to pave between the rails of its tracks. Subsequently, under the act of 1894, the city, by ordinance, required the company also to pave the street for one foot outside of the rails and assessed a special tax against it for the cost of the paving thereof. On these facts it was held that there was no contract between the company and the state or the city, the obligation of which was impaired for the reason that under the laws of the state subsisting at the time the incorporation of the railway company, *the state had reserved the right* to alter or amend the charter of the

company and thereby impose new or additional burdens upon it.

There is, however, a class of powers known as police powers which abide with the state for the promotion of the general welfare of society. Of this class, there is a *particular police* power which is always reserved to the state, with which the state never parts, which the legislature can never sell or bargain away. It is, indeed, the only shaft in the legislative quiver that can pierce the protecting shield which the genius of constitutional government throws over the sacred rights of private property. The existence of this power in its largest sense need not be justified or explained any more than the existence of air and light and heat. It is a natural force and pervades the entire universe, moral, physical, animate and inanimate; it is an inalienable attribute of all sovereignties, human and divine; it is life and development; within its eternal grasp are held all atoms and units and in obedience to its inevitable decrees, each moves to its appointed task in the harmonious development of a divine purpose. In civil government its activity depends upon a variety of circumstances, so infinite in character and combination one may as well try to "number the clouds in wisdom" as prescribe the conditions which impose its exercise or even suggest the extent of its operation.

Indeed, the limits within which the police power of the state may be exercised without invading the domain of the national government were first clearly defined and established in 1885 by the supreme court

of the United States in a very elaborate and exhaustive opinion delivered in the case of the *New Orleans Gas Light Co. v. La. Light, etc., Co.*, 115 U. S., 650, and to which further reference will be made herein.

This brings us to consider the subject matter of this controversy solely with reference to the police powers of the state. If it be true, as stated by Chief Justice TANEY, *supra*, that immediately upon its execution every contract is acted upon by the federal constitution, then whatever authority a state may possess to legislate for the protection and welfare of society it can, under the decisions of the supreme court of the United States, pass no law in that behalf which impairs the obligations of such contract except where it be *necessary* to protect the physical or moral health of the community. This limitation, as already stated, was first announced by the federal supreme court in *N. O. Gas Light Co. v. Louisiana Light, etc., Co.* No better statement of the character and scope of the opinion in that case can be made than the following from *Black on Constitutional Prohibitions*, p. 79.

> "It appeared that the legislature of Louisiana had granted to the New Orleans Gas Light Company the exclusive right for a period of fifty years, to manufacture and distribute gas in that city by means of pipes, mains, and conduits laid in its streets, to such persons or corporations as might choose to contract for the same. A few years later the new constitution of the state was adopted, wherein it is provided that 'the monopoly features in the charter of any corporation now existing in this state, save such as may be contained in the charter of railroad companies, are hereby abolished.' Another gas company was then incor-

porated, and given the privilege of supplying New Orleans with gas. The first company thereupon sought an injunction to restrain the second company from digging up the streets of the city, for the purpose of laying its pipes, and from ascertaining any right to do so until the expiration of fifty years from the date of complainant's charter. For the plaintiff it was contended that the grant of exclusive privileges contained in its charter constituted a contract which the state was not at liberty to impair, either by subsequent legislative enactment or by a change in her organic law. It was answered for the defendant that since the supplying of the city with gas had relation to the public comfort, and, in some sense, to the public health and safety, it was an object embraced within the police power of the state, and that it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects; consequently that the state might, at pleasure, recall the grant of exclusive privileges to the plaintiff, and that to do so, in the exercise of the police power, would in no sense impair any contract within the meaning of the Federal constitution. The opinion of the court was delivered by Mr. Justice HARLAN, who, after stating that the police power was, from its very nature, incapable of very precise definition or limitation, and that it was often taken in such a broad sense as to include all legislation and almost every function of civil government, proceeded to show that in *this* sense, its exercise must always be subject to the condition that it shall not encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land. By way of illustration, he cited cases where ordinances which interfered with the paramount authority of congress to regulate commerce with foreign nations and between the several states, were denied to be within the police power, and cases in which grants of exclusive privileges respecting public highways and bridges had been sustained as contracts, the obliga-

tion of which was protected from impairment by the states. He then reviewed the recent adjudications of the supreme court in which the extent and limitations of the police power had been pointed out, and reached the conclusion that, where reference is made to that police power which is always reserved to the state, with which the state never parts, which the legislature can never sell or bargain away, its sphere must be limited to the two subjects of the *public health* and the *public morals*. 'The principle,' says the learned judge, 'on which the decisions (in these cases) rest, is, that one legislature cannot so limit the discretion of its successors, that they may not enact such laws as are *necessary to protect the public health and the public morals*. That principal, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or public morals. It is fairly the result of these cases, that statutory authority, given by the state under her police power to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.' "

The decisions referred to in this opinion and from which the court deduced its conclusions and judgment, were rendered in

Beer Co. v. Massachusetts, 97 U. S., 32;
Fertilizing Co. v. Hyde Park, 97 U. S. 663;
Stone v. Miss., 101 U. S., 814;
Butchers Union v. Crescent City, etc., Co., 111 U. S., 746.

In every one of these cases the state was under

the *pressure of absolute necessity* to choose between annulling its contract obligations or permitting the continuance of a business which the legislature had declared detrimental to either the moral or physical health of the community. The question of expense was not involved. There was absolutely no other means by which society could be protected against the injuries resulting from previous legislative engagements. Consequently, the legislation of the several states concerned was *necessary* to protect the moral or physical health of their respective communities.

In the beer case, for instance, the state of Massachusetts, having entered into a contract with its citizens by which they were created a corporation and authorized to manufacture and sell beer, and the legislature having subsequently declared the business injurious to the moral health of the community, *there was no alternative* for the state but to cancel its engagements regardless of the pecuniary loss thereby incidentally inflicted upon the property rights and interests of the individuals concerned.

In the fertilizing case, the company, under its charter, which amounted to a contract with the state, had established and was prosecuting a business which had become detrimental to the health of the community of Hyde Park. Under a subsequent act of the legislature, the city adopted measures which operated to interdict the business of the company and thereby deprive it of the use of its property. In the suit which followed, the company pleaded the protection of the federal constitution against the impair-

ment of contract obligations but the court held that the legislation involved was clearly an exercise of that particular police power of which the state could not be divested by any contract between it and its citizens. In this case, the same as in the beer case, the state had no choice in the matter. There was no other means by which it could protect the health of the community except by authorizing the municipality to adopt and enforce legislation which impaired the obligations of the contract under which the company had established its business.

These cases, as also the others referred to, establish two propositions: (1.) That the reserved right of the state must be limited in its exercise to securing the public health or the public morals. (2.) That the exercise of the right itself must be necessary to secure these objects. It is not enough that the purpose and effect of the legislative enactment may be to protect the public health or the public morals, but it must also be that such protection can be secured in no other way.

To again quote from Justice Harlan's opinion in the N. O. Gas Light Co. case, "The principles upon which the decisions in *Beer Company v. Massachusetts; Fertilizing Co. v. Hyde Park; Stone v. Mississippi*, and *Butchers Union Co. v. Crescent City Live Stock Co.* rest, is that one legislature cannot so limit the discretion of its sucessors that they may not enact such laws as are *necessary* to protect the public health and the public morals." In other words, notwithstanding the constitutional declaration to the contrary, the state

may *where it is necessary to do so*, pass a law impairing the obligations of contracts.

A viaduct over railroad tracks located across a public street may be essential to the public safety, but it *does not follow that a legislative enactment impairing the obligation of an existing contract is necessary to secure its construction and maintenance*, and any attempt therefore upon behalf of the state to establish a viaduct through such legislation, however necessary the viaduct itself may be to the public safety, would be an invasion of the federal jurisdiction unless adopted under the compulsion of state necessity.

What the federal constitution denounces is the *enactment* of any law which impairs the obligation of contracts. The language of the constitution is: "No state ....,shall pass any..... law impairing the obligation of contracts."

When, therefore, the state is brought to the bar of federal justice to answer to the charge of invading the national domain, it can only justify legislative enactments which impair contract obligations as an exercise of that power which not only abides with the state always, but which in its operation may transcend even the express authority of the federal government. The plea, therefore, involves the question how far the exercise of an authority delegated to the federal government may be defeated by the states under an implied reservation to them. Whatever difficulty there may be in defining the *boundaries* of this reservation, the *essential principles* by

which they may be located should be clearly established.

The inhibition upon the states operates upon the legislatures thereof and disqualifies them from passing any law impairing contract obligations, consequently if, notwithstanding this inhibition, a state may pass such a law, it must be by virtue of a right impliedly reserved, the exercise of which may be justified even to the extent of restricting or obstructing the use of every power granted to the national government. Such right can find support in no principle less broad than that which involves the entire compact between the people and their governments, state and federal. Indeed, this so-called reserve power amounts to nothing less than an authoritative recognition of the existence in our political system of the principle of self preservation as an active and controlling force in the administration of governmental affairs. It abides not only with the state but also with the individual, and his legal right of self-defense is but an adaptation of this principle to the requirements of his social and political obligations, so it happens that in the moment of his extremity, when social and political forces are no longer adequate for his protection, this genius which abides with him always, emancipates him from all allegiance and remits him to the possession of his natural liberty, and the use of his natural forces. The apotheosis of the citizen into the natural man can be wrought only under the *compulsion of absolute necessity*.

So, with respect to our political system, the so-

called reserve power which enables legislatures to pass laws expressly interdicted by the federal constitution or to cancel solemn engagements between the state and its citizens, though authorized by previous enactments, is an adaptation of this same principle to the necessities and obligations of the state. There is something which runs not only through every legislative enactment but also in every line of the sacred instruments by which the people have established their institutions and in which they have provided for the distribution of their sovereign powers, we call the spirit of our institutions. It is nothing less than the instinct of self preservation, the exercise of which in society is limited and controlled by positive institutions and laws. In the case of the individual it is asserted only through the use of brute force; in that of the state, always through the observance of established principles. The life of a man may be preserved by physical force; the life of a people through the maintenance of the *principles of judicial construction.* In either case it is a matter of supreme necessity.

When the state commands the citizen to sacrifice his personal rights or private property to serve the public interest, the sovereign command must originate in a supreme necessity and issue only in the cause of an imperiled community.

Can it be said, as it certainly must be if the defendant in error's contention be sustained, that the legislation in question originated in the necessity of the state; that to secure the public safety it was *necessary* to cancel the contract between the state and the railroad companies providing therefor, in other words, that the

path to the viaduct lies only amid the *fragments of dishonored municipal obligations*?

Can a more striking contrast be presented between the several sets of facts involved in the cases of the *Beer Co. v. Massachusetts*, the *Fertilizing Co. v. Hyde Park*; *Stone v. Mississippi*, and the *Butchers Union v. Crescent City*, reviewed by Justice Harlan in his opinion, *supra*, and the circumstances presented here? Was not the contract itself, under which the viaduct was constructed and is to be maintained, entered into solely for the purpose of securing the public safety and will not the performance of the obligations thereby assumed accomplish every purpose and secure every result which can be realized through the exercise of the police power of the state? No question is here raised as to the *capacity* of the viaduct nor can it be contended that if it be repaired *by the city, as required by the contract, it will not be just as convenient and safe as if repaired by the railway companies acting under compulsion of the police power.* Does not the municipality possess all the resources and powers possessed by the railway companies to enable it to perform the obligations of this contract? This case presents no considerations, such as were presented in the cases above referred to. *The business of maintaining viaducts has not become a public nuisance.* Indeed, the very act which the city invokes in aid of this proceeding approves and seeks to command their construction and continuance.

In his opinion in the New Orleans Gas Light case, and speaking with reference to the circum-

stances involved in that controversy, Mr. Justice Harlan says:

> "The present case involves no such considerations. We have seen, the manufacture of gas and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which everyone may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision. *It is one which, so far from affecting the public injuriously*, has become one of the most important agencies of civilization for the promotion of the public convenience and the public safety."

Again, he says, speaking of the contract itself: "It is not in any *legal* sense to the prejudice of the public health or the public safety." The decision in this case establishes the principle that the execution of a contract between the state and its citizens, though *operating to create a monopoly in a business necessary to the public welfare and in a sense to the public health and safety*, could not be defeated by a subsequent legislative enactment; that such enactment could not be justified as an exercise of that particular police power which always abides with the state for the protection of the moral or physical health of the community.

It should be noticed that the circumstances which assisted the judgment of the court in the case, and to which its reasoning was applied, gave a much stronger support to the contention of the state than the relator can gather to its aid from the exhibits and proofs presented by the record herein.

SECTION 48 AND CITY ORDINANCE NO. 3752 CARRYING ITS PROVISIONS INTO EFFECT, IMPAIR THE OBLIGATIONS OF THE CHARTER CONTRACT BETWEEN THE STATE AND THE PLAINTIFF IN ERROR.

The Omaha and Southwestern Railroad Company—the predecessor of the plaintiff in error—was organized in 1869 (rec. p. 50) under the act of 1866 providing for the incorporation of railroad companies. Section 83 of this act provided:

"If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter."

Subsequently in 1884, upon the application of the plaintiff in error, under the name and style of the Omaha and Southwestern Railroad Company, the right to locate its track across Eleventh street was granted to it upon the terms and conditions expressed in ordinance 729, as follows:

Section 2. "Said Omaha and Southwestern Railway Company

shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portion of said streets and alleys as a part of its line; provided, that said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may may be, and so as to interfere as little as possible with the travel along and upon said streets; and provided, that nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company in any portion of the streets and alleys herein named and enumerated."

It is not claimed that at the date of the organization of the company, there was any constitutional provision or public statute in force reserving to the state the right to alter, amend or repeal the charter of the company, unless such right be established by section 103 of the act of incorporation, which reads:

"Every railroad corporation shall maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike, road, canal, watercourse or other way."

But this section read with sections 83, 86, 101, 102, 103 and 106 (post. p. 104, 105) clearly indicates a purpose to provide only for the maintenance of "bridges with their abutments" outside the limits of municipalities and built by the railroad companies "in the construction of their lines." The obligation, therefore, imposed upon the state and the railroad company by

the charter and ordinance contracts must, under the federal constitution, be held inviolable except where it may be necessary to pass a law impairing them for the purpose of securing the moral or physical health and safety of the community.

That the maintenance of the viaduct is essential to the safety of the community is not questioned. It is, however, insisted that if existing contract obligations devolve this burden upon the city, the legislature of the state cannot, under the plea of public necessity, pass a law imposing it upon the plaintiff in error, without bringing the act within the prohibitions of the federal constitution. There is a wide difference between the enactment of a law which originates in a public necessity, and the enactment of one which can be justified only on the ground of public economy.

In his brief, the opposing counsel has inserted a paragraph from the opinion of this court in *New York and New England Co. v. Bristol* with the assurance that it disposes of this contention of the plaintiff in error, but in that case, the state of Connecticut had reserved the right to amend the charter of the railroad company, and the state supreme court had held that the statute under consideration operated as an amendment. In view of these circumstances, the declaration contained in the paragraph may well be taken as a statement in general terms of the result of the adjudications in the cases cited in that connection rather than a determination of any issues involved in that controversy.

These cases certainly establish the principle an-

nounced, but the legitimate exercise of the "legislative power in securing the public safety, health and morals" and "governmental regulation in particulars essential to the preservation of the community from injury" *imply legislative necessities* as well as state and municipal conveniences and economies.

In *Beer Co. v. Massachusetts*, *Fertilizing Co. v. Hyde Park*, *Stone v. Mississippi*, *Butchers Union v. Crescent City*, *Barbier v. Connely* and *Mugler v. Kansas*, *the state was under the pressure of absolute necessity to pass laws which in fact impaired the obligations of existing contracts.* The physical or moral security of the communities could not be secured by the enactment of laws that would not impair such obligations, thus the expressions "the legitimate exercise of legislative power in securing the public safety, health and morals" and "governmental regulation in particulars essential to the preservation of the community from injury," are to be read as equivalent to a declaration by the court, that the enactment of particular laws, and not merely the improvements or devices which they may provide for, must be necessary. Indeed, in *New Orleans Gas Light Co. v. Louisiana Light Co.*, cited in the paragraph, this court declared the principle upon which the decisions in these cases rest, to be "that one legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health and the public morals."

The case of *Budd v. New York*, is also cited in the paragraph, but that case simply affirmed the doc-

trine of *Munn v. Illinois*, and did not involve questions touching the preservation of the community, nor were the source and extent of legislative authority to enact laws impairing contract obligations examined or determined in that controversy. Whatever may be the merits of this particular contention, it is submitted that in none of these cases has it been settled by the adjudications of this court.

It is, however, claimed by the plaintiff in error, that if the state is without reserved legislative power over the charter of the company, it cannot under the guise of the police power, impose upon it the extra cost and expense incident to the construction and maintenance of a more expensive crossing than the one expressly provided for in the contract under which its track was located across Eleventh street.

In rendering their opinions in this case, the state courts rest their judgments upon the doctrine that the legislative control over the crossing in question is absolute and that whatever obligations with respect thereof may have been imposed by the contracts between the state, or the municipality upon the one hand, and the railroad company upon the other, it is competent for the state, through the exercise of its police powers, to compel the company to build and maintain at its own expense, such crossing as in the legislative or municipal judgment may be deemed necessary for the public safety.

With respect to this contention, counsel for the company has attempted no more than to distinguish

the cases cited, from the case at bar, and to state briefly the views which, upon a later hearing, he hopes may be abundantly fortified by reason and authority; and with respect to the entire field of dispute it may be suggested that at least some of the questions are as unique in character as the legislation in which they originate and therefor may not be silenced by a motion which can find no other encouragement than an array of authorities either irrelevant to the matters in issue or that clearly sustain the contentions of the plaintiff in error.

CHAS. J. GREENE,
For Plaintiff in Error.

Excerps from the Nebraska Act of 1866 providing for the Incorporation of Railroad Companies. Rev. Stat. of Neb. 1866, pages 213–232:

* * * * * * * * *

"SEC. 83. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied, and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purpose of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter."

* * * * * * *

"SEC. 86. Any railroad company may construct and carry their railroad across, over or under any road, railroad, canal, stream or water-course, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct their railroad crossings as not unnecessary to impede the travel, transportation or navigation upon the road, railroad, canal, stream or water-course so crossed. Said corporation shall have the right to change the channel of any stream or water-course from its present location or bed, whenever it may be necessary in the location, construction or use of their said road, provided they do not change its general course, or materially impair its former usefulness."

* * * * * * *

"SEC. 101. Any railroad corporation may raise or lower any

turnpike, plank road, or other way, for the purpose of having their railroad pass over or under the same; and in such cases said corporation shall put such turnpike, plank road or other way, as soon as may be, in good repair."

"SEC. 102. Every railroad corporation, while employed in raising or lowering any turnpike or other way, or in making any other alterations, by means of which the said way may be obstructed, shall provide, and keep in good order, suitable temporary ways to enable travelers to avoid or pass such obstructions."

"SEC. 103. Every railroad corporation shall maintain and keep in good repair all bridges, with their abutments, which said corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike, road, canal, water-course or other way."

* * * * * * *

"SEC. 106. When any person owns land on both sides of any railroad, the corporation owning such railroad shall, when required so to do, make and keep in good repair one causeway or other adequate means of crossing the same."

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 324.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA EX REL. THE CITY OF OMAHA,
Defendant in Error.

In Error to the Supreme Court of the State of Nebraska.

BRIEF OF DEFENDANT IN ERROR ON MOTIONS TO DISMISS AND AFFIRM.

C. J. GREENE, AND
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W. J. CONNELL,
Attorney for Defendant in Error.

(16,300)

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,
Plaintiff in Error,
vs.
THE STATE OF NEBRASKA EX REL. THE CITY OF OMAHA,
Defendant in Error.

In Error to the Supreme Court of the State of Nebraska.

BRIEF OF DEFENDANT IN ERROR ON MOTIONS TO DISMISS AND AFFIRM.

This is a mandamus proceeding brought by the city of Omaha, Nebraska, against the Chicago, Burlington and Quincy Railroad Company for the purpose of compelling the latter to make certain repairs to a railway viaduct within the former's corporate limits. The suit was begun in the district court of Douglas county, Nebraska, and taken on error to the supreme court of that state, which affirmed the judgment of the court below in favor of the city. The railroad company thereupon brought the cause before this court on the ground that federal questions were in-

volved and were decided adversely to constitutional provisions. The defendant in error has filed its motion to dismiss the writ of error herein for want of jurisdiction, and united therewith a motion to affirm the judgment of the state court, on the grounds named in rule 6, paragraph 5 of the rules of this court. The brief now submitted is in support of those motions.

STATEMENT OF THE CASE.

In 1869, a corporation called the Omaha and Southwestern Railroad Company was organized in the state of Nebraska, and immediately constructed its line which began in the city of Omaha and ran out into the state in a southwesterly direction. Its sole charter was the general statute law of the state then in force relating to corporations, being Ch. 25, Rev. St. Neb. 1866.

Section 83 of the said statute is especially relied upon in this controversy by the railroad company, as the foundation of its claim that the city has contracted to repair the viaduct in question. It reads as follows:

"Sec. 83. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley or other

public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter."

Section 103 of the same chapter is in these words:

"Sec. 103. Every railroad corporation shall maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike, road, canal, water course or other way."

The property and franchises of the Omaha and Southwestern in 1871 passed by a lease of 999 years to the Burlington and Missouri River Railroad Company, which transferred all its interests to the plaintiff company in 1880.

In 1884 the city council of Omaha passed its ordinance No. 729, relied upon by the plaintiff in error as in some way further supporting its said claim of a contract with the city for viaduct repairs. The ordinance is as follows.

"ORDINANCE NO. 729.

"Sec. 1. [Grants to the Omaha and Southwestern Railway Company a right of way through and across certain specified streets and alleys, including Eleventh street.]

"Sec. 2. Said Omaha and Southwestern Railway Company shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portion of said streets and alleys as a part of its line; provided, that said railroad track and tracks are constructed so as to conform to the grade of said streets as near as may be, and so as to interfere as little as possible with the travel along and upon said streets; and, provided, that nothing herein contained shall be construed

as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company, now laid and operated by said Union Pacific Railway Company in any portion of the streets and alleys herein named and enumerated." (Rec. 70.)

Soon thereafter the plaintiff in error constructed its line across Eleventh street, alongside of some twenty tracks of the Union Pacific Railroad Company previously laid. We come now to the construction of the viaduct in question, popularly known as the "Eleventh Street Viaduct."

In 1885 the Nebraska legislature passed an act "to provide for viaducts, bridges and tunnels in certain cases in cities of the first class," (Laws 1885, Ch. 12) commonly known as the "viaduct act," which is as follows:

"Sec. 1. That the mayor and city council in any city of the first class shall have power, whenever they deem any improvement, herein provided for, necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct, or bridge over, or tunnel under any railroad track or tracks, switch or switches in such cities, when such track or switches cross or occupy any street, alley or highway thereof, in the manner and to the extent hereinafter provided.

"Sec. 2. Whenever any such viaduct, bridge or tunnel shall be deemed necessary, as provided in the preceding section, the mayor and city council shall have the power to secure and adopt plans and specifications therefor together with the estimated cost of the work, and thereupon, if the railroad company or companies across whose tracks or switches the work is proposed to be built, will assume three-fifths (3-5) of the entire cost thereof, and three-fifths (3-5) of all damages to abutting prop-

erty on account of construction of said viaduct, bridge or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require, and when the payment of the further sum of one-fifth (1-5) of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donation or by execution of good and sufficient bond as will protect said city from the payment of said one-fifth (1-5), then the said mayor and council may proceed to contract with the necessary party or parties for the construction of such viaduct, bridge or tunnel under the supervision of the board of public works of such city, and to provide for the payment of one-fifth (1-5) of the cost thereof by the city, by special tax on all taxable property in such city, and one-fifth (1-5) by special tax to property benefited, as provided in the following section, if not otherwise provided for.

"Sec. 3. The money necessary to pay two-fifths (2-5) of the entire cost of any such viaduct, bridge or tunnel, which the city is to bear, shall be raised as follows, viz: one-fifth (1-5) of the entire cost of the work, or so much thereof as shall be covered by special benefits, shall be paid by special assessment or special taxation of real property benefited by said improvement, which benefits shall be appraised and assessed by the mayor and council upon property benefited, and according to benefits, and in such manner as said mayor and council shall direct and determine; such assessment to become due and payable within fifty days after the levy is made; and the payment of all such assessments shall be enforced in the same manner, and with like penalties for delinquencies, as are provided in the case of special assessments for the paving of streets in such city. And the remainder one-fifth (1-5) together with two-fifths (2-5) the cost of damages to abutting property, required to be paid shall be paid by said city, and shall be paid out of a special fund created and raised for the purpose of defraying the cost of such improvement, and by a tax on all the taxable property within the city; and such

tax to be levied when ordered by the mayor and council, and payable at the same time as the city taxes for general city purposes.

"Sec. 4. The city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge, or tunnel, as herein provided, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions, and for such compensation as shall be agreed upon between the city and the street railway company. And the compensation paid for such use shall be set apart and used towards the maintenance of such viaduct, bridge or tunnel.

"Sec. 5. Before entering upon the construction of any work contemplated by this act, the said mayor and council shall provide for assessing and appraising the damages, if any, sustained by property abutting upon such improvements, from which appraisal of damages the owner shall have the right of appeal to the district court, as now provided by law in similar cases. The proceedings for ascertaining any such damages shall be the same as provided for in case of the change of grade of streets. And said damages shall be paid by the city, as provided in sections two and three of this act.

"Sec. 6. The mayor and council of any such city shall have the power to pass any and all ordinances, not in conflict with this act, that may be necessary or proper for the construction, maintenance and protection of the works herein provided for."

In accordance with the above act during the following year a tripartite agreement was made between the Union Pacific Railway Company, the plaintiff in error and the city of Omaha. It is claimed by the plaintiff in error that this contract created an obligation upon the city to repair the viaduct therein pro-

vided for. So far as it is pertinent to this controversy I now quote the contract. (Rec. 65.)

"* * * Witnesseth, that the said parties of the second part, in pursuance of the provisions of an act of the legislature of the state of Nebraska entitled, 'An act to provide viaducts, bridges and tunnels in certain cases in cities of the first class,' do hereby assume and agree to pay, as may be required by the mayor and city council of said city, three-fifths of the entire cost of constructing a viaduct along Eleventh street, and three-fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions; such entire cost and damages not to exceed the sum of ninety thousand dollars ($90,000); the amount so assumed and agreed to be paid being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company, and one-fourth thereof to be paid by said Omaha and Southwestern Railroad Company. * * * The plans and specifications for said viaducts, before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part; and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of such increased cost and damages in the same manner, and according to the same division, as hereinbefore agreed. * * *"

In 1887 the viaduct was completed and thrown open to the use of the public, and later in the same year the city of Omaha took its charter as a city of the metropolitan class. Section 48 of the new charter related to viaducts and was amended in 1893 so as to read as follows:

"Sec. 48. The mayor and council shall have power to require any railway company or companies owning or operating any railway track or tracks upon or across any public street or streets of the city, to erect, construct, re-construct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. * * * When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, re-construct, or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, re-construct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars ($100) and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offense, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceedings to erect, construct, re-construct or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power whenever any railroad company or companies shall fail, neglect or refuse to erect, construct, re-construct or repair any viaduct or viaducts after having been required so to do as herein provided, to proceed with the erection, construction, re-construction or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the costs of the erection, construction, re-construction or repair of such viaduct or viaducts against the property of the railroad company or companies required to

erect, construct, re-construct or repair the same, and such cost shall be a valid and subsisting lien against such property and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court." Sess. Laws 1895, p. 70, c. 3, § 7.

The foregoing is the act the enforcement of which by the state court the plaintiff railroad company claims impairs the obligation of its contracts with the city and state, takes its property without due process of law, and denies it the equal protection of the laws.

In 1894 the city council passed its ordinance No. 3752. (Rec. 64.) The ordinance is as follows:

"Whereas, it has been and hereby is deemed and declared necessary for the safety and protection of the public that the Eleventh street viaduct be repaired as herein required; and

"Whereas, it is right, proper and reasonable that the railroad companies owning or operating railway tracks across said Eleventh street should make said repairs to said viaduct; therefore,

"Be it ordained by the city council of the city of Omaha:

"Sec. 1. [Approves the city engineer's plans and specifications for the repairs of said viaduct.]

"Sec. 2. [Directs and requires the Union Pacific Railway Company to repair the north two thirds of such viaduct and the plaintiff railroad company to repair the south one-third thereof, in accordance with the said plans and specifications.]

"Sec. 3. [Directs the city clerk to furnish the said railway companies with a duly certified copy of the ordinance, and directs the city engineer to furnish to each of them a copy of said plans and specifications, and also to superintend the work of making said repairs.]"

The plaintiff in error having refused to comply with the requirements of the ordinance these proceed-

ings were begun and successfully prosecuted through the highest court of the state of Nebraska whence they are brought to this forum under the claim that rights guaranteed to the unsuccessful party by the constitution of the United States have been denied it.

To complete the statement of the case it is only needed to add to the foregoing a reference to the special allegations made by the plaintiff in error in its various pleadings as a basis for invoking the jurisdiction of this court over the judgment of the state court.

The jurisdictional allegations in the pleadings in the district court of Douglas county. In the railroad company's answer to the application for the writ of mandamus it set up as paragraph nine (Rec. 14) the tripartite agreement above mentioned, and in a later paragraph (Rec. 20) it "submits that it is not competent for the legislature to impose upon it the duty of maintaining or repairing the Eleventh street viaduct, for the reason that to do so would be in violation of the obligations of the contract hereinbefore recited and contrary to the provisions of the constitution of the United States."

The seventeenth paragraph of the same answer (Rec. 17) is as follows:

"Seventeen. The respondent further alleges that the viaduct aforesaid covers a space on Eleventh street of about twelve hundred fifty (1,250) feet, of which about 400 feet is occupied by the several tracks owned or operated by the railway companies above referred to; that the remainder of such space was, before the construction of the viaduct, somewhat oc-

cupied and used by the public for street purposes, and was, under the law, controlled and cared for by the city of Omaha; that the distance from the north line of the space occupied by the track aforesaid to the north line of the viaduct is about seven hundred feet, and this respondent submits that it is not competent for the legislature to put upon the railway companies the burden of maintaining or repairing that portion of the viaduct over such unoccupied space of the said street, as the city would, but for the existence of such viaduct, be required under the law to maintain and repair; that whatever the rule of law may be as to the construction of the viaduct, the city shall be required in any event to contribute such proportion of the entire cost of its maintenance and repairs as that part of the street under the viaduct it would in the absence thereof be required to maintain and repair bears to the entire part of the street occupied by said viaduct, and it is submitted that any law authorizing and empowering the relator to impose such costs upon the railway companies named in its petition is unconstitutional and void and an arbitrary and unwarranted exercise of legislative power and contrary to the settled policy of the state of Nebraska and in violation of the several provisions of the constitution thereof and of the United States."

The pleadings at *nisi prius* contain no other reference to any rights under the constitution of the United States.

In the motion for a new trial the petitioner in error made no other claim to rights under the constitution of the United States than the following:

"15. The court erred in holding that the charter of the predecessor of this respondent and an ordinance No. 729 of the relator did not constitute a contract between this respondent within the meaning and protection of the constitution of Nebraska and the United States guaranteeing the inviolability of contracts. (Rec. 35.)

"25. The court erred in compelling this respondent to

arbitrarily repair one-third of the viaduct in controversy, when as a matter of fact, this respondent only owned and operated a single track out of twenty-one or more tracks which crossed Eleventh street under said viaduct, that requirement being arbitrary, unjust, inequitable, unreasonable and unconstitutional." (Rec. 35.)

The jurisdictional allegations in the petition in error to the supreme court of Nebraska. All the allegations relating to any constitutional question which were made in the petition in error to the state court are found on page 2 of the record, and are as follows:

"5. The court erred in holding that the provisions of section 48 of the charter creating cities of the metropolitan class, as amended in 1893, did not impair the obligations arising out of the contract between this respondent and the relator relative to the construction of the Eleventh street viaduct."

"7. The court erred in not holding section 48 of an act entitled 'an act incorporating metropolitan cities' etc., as amended in 1893 unconstitutional."

"9. The court erred in holding that the charter of the predecessor of this respondent and an ordinance, No. 729, of the relator did not constitute a contract between this respondent within the meaning and protection of the constitution of Nebraska, and the United States, guaranteeing the inviolability of contracts."

"13. The court erred in compelling this respondent to arbitrarily repair one-third of the viaduct in controversy, when, as a matter of fact, this respondent only owned and operated a single track out of twenty-one or more tracks which crossed Eleventh street under said viaduct; that requirement being arbitrary, unjust, inequitable, unreasonable, and unconstitutional."

Provisions of the state constitution.

"Sec. 3. No person shall be deprived of life, liberty or property without due process of law."

"Sec. 16. No * * * law impairing the obligations of contracts * * * shall be passed."

"Sec. 21. The property of no person shall be taken or damaged for public use without just compensation therefor."

On the above record the plaintiff railroad company makes in this court the following assignment of errors:

"1. The supreme court of Nebraska erred in making the decree or judgment rendered in this suit and in affirming the erroneous judgment therein of the district court of Douglas county, Nebraska..

"2. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the constitution of the United States.

"3. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the constitution of the United States.

"4. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7, of chapter 3, Laws of Nebraska, 1893, it im-

pairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the constitution of the United States.

"5. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the provision of the constitution of the United States.

"6. The decree or judgment is erroneous in that it deprives the Chicago, Burlington and Quincy Railroad Company of its property and confers it upon other persons for a private use, contrary to the constitution of the United States.

"7. The decree or judgment is erroneous in that it deprives the Chicago, Burlington and Quincy Railroad Company of its property without making just compensation therefor, contrary to the constitution of the United States and in abridgment of the privileges and immunities of the Chicago, Burlington and Quincy Railroad Company, thus denying to it the equal protection of the law.

"8. The decree or judgment is erroneous in that it deprives the Chicago, Burlington and Quincy Railroad Company of its property without due process of law, contrary to the constitution of the United States."

PRESENT CONTENTIONS.

By its united motions to dismiss the writ for want of jurisdiction and to affirm the judgment of the state court, the defendant in error raises these contentions:

First. That this court is without jurisdiction

for the reason that the record does not show a case within the purview of section 709 of the Rev. St.

Second. That conceding the cause to be within the jurisdiction of this court, the judgment of the state court should be affirmed on motion, for the reason that the question on which the jurisdiction depends is so frivolous as not to need further argument; that paragraph 5 of rule 6 of this court should be applied to it.

I.

The record does not present a case within the purview of Sec. 709 Rev. St. inasmuch as (1) the law requires that the constitutional right relied upon in this court should have been properly set up or claimed in the state court; (2) and such requirement is not met in this case.

(1) *The law relating to the requirement that the constitutional right should be properly set up in the state court.* Sec. 709 confers jurisdiction upon this court to re-examine the final judgment of the highest court of a state *inter alia*, "where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution of * * * the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the constitution of * * the United States, and the decision is against the title, right,

privilege or immunity *specially set up or claimed*, by either party, under such constitution. * * *"

The subject has been so frequently considered by this court that it is not now an open question that the constitutional right relied upon in this court must have been first set up or claimed in the state court at the proper time and in the proper way. Nor in the light of the numerous decisions is it difficult to determine what constitutes a proper time and a proper way to set up or claim the right in the state court.

In a recent case (*Morrison v. Watson*, 154 U. S. 111, S. C. 14 Sup. Ct. Rep. 995) where the question involved was the impairment of a contract obligation by a state statute, this court, speaking by Mr. Justice Gray, said:

"In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a state, on the ground that it decided against a title, right, privilege, or immunity claimed under the constitution or a treaty or statute of the United States, such title, right, privilege or immunity must have been 'specially set up or claimed' at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law and practice of the state, as declared by its highest court, could not be considered by that court, or if it was not claimed in any form before judgment in the highest court of the state, it cannot be asserted in this court. Rev. St. § 709; *Spies v. Illinois*, 123 U. S.. 131, 181, 8 Sup. Ct., 21; *Brooks v. Missouri*, 124 U. S., 394, 8 Sup. Ct., 443; *Chappell v. Bradshaw*, 128 U. S. 132, 134, 9 Sup. Ct., 40; *Brown v. Massachusetts*, 144 U. S. 573, 1 Sup. Ct., 757; *Bank v. Bolong*, 150 U. S. 85, 14 Sup. Ct., 24; *Miller v. Texas*, 14 Sup. Ct., 874."

The fact that the foregoing principle was stated and applied in a case where the only claim of a fed-

eral question was the alleged impairment of a contract obligation, must be regarded as in substance deciding that the validity of a state statute is not drawn in question on the ground of its being repugnant to the constitution of the United States, unless such repugnance is specially set up or claimed in the same manner and at the same time required in the case of any other title, right, privilege or immunity conferred by the federal constitution.

In the *Anarchists' Case*, 123 U. S. 131, S. C. 8 Sup. Ct. Rep. 31, it was said by Mr. Chief Justice Waite:

"Something was said in argument about an alleged unreasonable search and seizure of the papers and property of some of the defendants, and their use in evidence in the trial of the case. Special reference is made in this connection to the letter of Most about which Spies was cross-examined; but we have not been referred to any part of the record in which it appears that objection was made to the use of this evidence on that account. And upon this point the supreme court of the state, in that part of its opinion which has been printed with the motion papers, remarks as follows: 'The objection that the letter was obtained from the defendant by an unlawful seizure is made for the first time in this court. It was not made on the trial in the court below. Such an objection as this, which is not suggested by the nature of the offered evidence, but depends upon the proof of an outside fact, should have been made on the trial. The defense should have proved that the Most letter was one of the letters illegally seized by the police, and should then have moved to exclude or oppose its admission on the ground that it was obtained by such illegal seizure. This was not done, and therefore we cannot consider the constitutional question supposed to be involved.'"

"Even if the court was wrong in saying that it did not ap-

pear that the Most letter was one of the papers illegally seized, it still remains uncontradicted that objection was not made in the trial court to its admission on that account. To give us jurisdiction under section 709, Rev. St., because of the denial by a state court of any title, right, privilege, or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time, and in the proper way. To be reviewable here, the decision must be against the right so *set up or claimed*. As the supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment of errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of the waiver of a right under the constitution, laws, or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence, is not before us, and therefore no foundation is laid under this objection for the exercise of our jurisdiction."

And in *Gray v. Coan*, 154 U. S., 589, 14 Sup. Ct. Rep., 1168, the syllabus of the case reads:

"The supreme court has no jurisdiction to review the judgment of a state court on writ of error, unless it affirmatively appears from the record, that a question under section 25 of the judiciary act was made by the pleadings, and passed on by the court."

From the two foregoing decisions, it is plain that in order to be available here the constitutional right must have been set up and claimed not only in the supreme court of the state, but also in the trial court.

The same rule is stated in the foregoing quotation from *Morrison v. Watson, supra*, together with the reason of the rule, viz: that the state supreme court can only review such matters as have been passed upon by the lower court. In this connection it is pertinent to inquire into what is the "law and practice of the state of Nebraska as declared by its highest court" touching the review of proceedings in the lower court. In *Harrington v. Latta*, 23 Neb., 98 that court said:

"We take it to be the well established law of this state that a motion for a new trial is necessary to obtain a review of the case on error in this court, and that the errors relied on should have been specifically pointed out to the district court."

And in *Norton v. Nebraska Loan and Trust Co.*, 40 Neb., at page 398 it was said:

"The motion to vacate the order of confirmation and set aside the sale, filed in the lower court, contained but two reasons for so doing, one being that the property was not advertised as the law requires, and the other that the purchaser was deceived by the sheriff and clerk of the district court as to liens and encumbrances and as to the title he would acquire by purchase at the sale, and did not raise the question of whether any bid was made by Norton, and if so, whether the bid was a conditional one, and this latter question is not presented in either the motion for a new trial or the petition in error, and, in accordance with the well established rule of this court, it cannot be considered here. (*Chicago, St. P. M. & O. R. Co. v. Lundstrom*, 16 Neb., 263; *Cruts v. Wray*, 19 Neb., 581; *Harrington v. Latta*, 23 Neb., 98; *Hurford v. Baker*, 17 Neb., 446. See, also, *Smith v. Spaulding*, opinion filed May 2, 1894, in which it was held: 'Parties will, as a rule, be restricted in this court to the theory upon which the cause was prosecuted or defended in the court of original jurisdiction.')"

There can be no question that according to the law and practice in the state of Nebraska no alleged error can be considered by its supreme court that has not been first pointed out in the motion for a new trial in the lower court. The logical conclusion is that the federal right must have been specially set up or claimed in the motion for a new trial in the original court in order that this court may have jurisdiction to review on error the judgment of the supreme court of Nebraska.

I turn now to still another point required in the specially setting up and claiming of the constitutional right. In *Endowment Assn. v. State of Kansas*, 120 U. S. 103, S. C. 7 Sup. Ct. Rep., 499, it was attempted to support the jurisdiction of this court on this allegation contained in the motion for a new trial in the lower court. "1. That said chapter 131 is unconstitutional and void." But Mr. Chief Justice Waite in the opinion said:

"From this statement it is clear that we have no jurisdiction, as no federal question appears affirmatively on the face of the record. It is true that in the motion for a new trial the question of the constitutionality of chapter 131 of the Act of 1885 was presented, but that is not enough, since it is nowhere shown that any provision of the constitution of the United States was relied on. The suggestion in the motion applies as well to the constitution of the state as to that of the United States, and it has long been settled that we have no jurisdiction unless it appears that a question under the constitution or law of the United States not only might have been but actually was raised and decided. *Crowell v. Randell*, 10 Pet. 368, 398; *Brown v. Colorado*, 106 U. S., 95, 97; S. C. 1 Sup. Ct. Rep., 175; *Chouteau*

v. Gibson, 111 U. S., 200, S. C. 4 Sup. Ct. Rep., 340, *Detroit City Ry. Co. v. Guthard*, 114 U. S., 133, S. C. 5 Sup. Ct. Rep., 811.

From that decision it is plain that the mere general objection that a statute is unconstitutional, does not challenge its agreement with the constitution of the United States. This rule must be specially applicable where the federal and state constitutions contain similar provisions. The constitution of the state of Nebraska contains the following:

"Sec. 3. No person shall be deprived of life, liberty or property without due process of law."

"Sec. 16. No * * * law impairing the obligation of contracts * * * shall be passed."

The last requirement in this regard to which I call attention is that a mere formal allegation that a state law is repugnant to the constitution of the United States is not of itself such an allegation of a federal question as will support the writ of error to the state supreme court. There must be some facts set up which will make a reasonable basis for the allegation. The special statement of this principle is found in *City of New Orleans v. New Orleans Water Works Co.*, 142 U. S. 79, S. C. 12 Sup. Ct. Rep., 145, where it was said:

"While there is in the amended and supplemental answer of the city a formal averrment that ordinance No. 909 impaired the obligation of a contract arising out of the act of 1877, which entitled the city to a supply of water free of charge, the bare averrment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal

question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay. Thus in *Millanger v. Hartupee*, 6 Wall., 258, it was held 'that to bring a case within that provision of the judiciary act, which declares that the final judgment of a state court may be re-examined, where is drawn in question the validity of an authority exercised under the United States, there must be something more than a bare assertion of the exercise of authority.' In delivering the opinion of the court the chief justice observed: 'The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims and authority under the United States. In respect to the question we are now considering, 'authority' stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and, on looking into the record, it should appear that no such treaty or statute existed, or was in force, it would hardly be insisted that this court could review the decisions of the state court, that the right or claim did exist.' This language was used in connection with the first clause of section 709 of the Revised Statutes, 'Where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity,' but it is equally applicable to the next clause, which covers the case under consideration, 'Where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity.'"

"Applying the principle of this decision to the present case, we think that, before we can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment and some ground to believe that it has been impaired; and that, to constitute a violation of the provisions against depriving

any person of his property without due process of law, it should appear that such person has a property in the particular thing of which he is alleged to have been deprived."

In line with the decisions above quoted from are the following:

POWELL V. SUPERVISORS, ETC., 150 U. S. 433, S. C. 14 Sup. Ct. Rep., 168.

CHOUTEAU V. GIBSON, 111 U. S. 200, S. C. 4 Sup. Ct. Rep., 340.

ADAMS COUNTY V. B. & M. R. R. CO., 112 U. S. 123, S. C. 5 Sup. Ct. Rep., 77.

DETROIT CITY RY. CO. V. GUTHARD, 114 U. S. 133, S. C. 5 Sup. Ct. Rep., 811.

OTIS V. OREGON STEAMSHIP CO., 116 U. S. 548, S. C. 6 Sup. Ct. Rep., 524.

SAYWARD V. DENNY, 158 U. S. 180, S. C. 15 Sup. Ct. Rep., 777.

CHEMICAL NAT'L BANK V. CITY BANK, 161 U. S. 1, 16 Sup. Ct. Rep., 419.

SUMMARY.

The requirements as to the proper setting up or claiming of the constitutional right plainly stated by the above decisions are there:

1. The right must be claimed in the trial in the *nisi prius* court by pleadings or exceptions duly taken to rulings; for otherwise there is no error in that regard committed by the trial court.

2. It must also be relied upon in the motion for

1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the provision of the constitution of the United States.

The claim here indicated was made in the plaintiff in error's pleading in the trial court, but was abandoned in the motion for a new trial (Rec. 35). Hence, as we have seen it was not properly before the state supreme court for adjudication.

But there is a still more serious objection to its consideration here which I will point out later.

"4. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the viaduct on Eleventh street, in said city of Omaha, described in the record herein, was built, contrary to the constitution of the United States.

This is merely the statement of the previous claim under a slightly different form, and is subject to the same objections which were made to it.

"3. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of ordinance No. 3752, passed by the city council of the city of Omaha on January 30, 1894, an authority exercised under the state of Nebraska, it impairs the obligation of the contract under which the track of the plaintiff in error across Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereon, was located and constructed, contrary to the constitution of the United States."

While this claim appears in substance in the

motion for a new trial and in the state court petition in error, it is not found anywhere in the pleadings nor in the proceedings during the trial of the case. The trial court could not deny this constitutional right for the reason it was not claimed before it until after the trial. The trial court did not rule upon it during the progress of the trial and consequently committed no error in refusing to grant the new trial on that ground.

"2. The decree or judgment is erroneous in that by adjudging the validity and the enforcement of section 48 of chapter 10, Laws of Nebraska, 1887, as amended in 1893, and constituting section 7 of chapter 3, Laws of Nebraska, 1893, it impairs the obligation of the contract under which the track of the plaintiff in error crosses Eleventh street, in the city of Omaha, Nebraska, under the viaduct thereof, was located and constructed, contrary to the constitution of the United States."

What has been said of the 3rd assignment of error applies to this one.

"1. The supreme court of Nebraska erred in making the decree or judgment rendered in this suit and in affirming the erroneous judgment therein of the district court of Douglas County, Nebraska."

I have said that to the claims that the legislation in question impaired contract obligations there is a more serious objection than that the claims were not set up in all the necessary places for making them. *They are mere formal averments wholly unsupported by any facts to give even color for asserting them.* The plaintiff in error at different times claims an

obligation rested upon the defendant in error not to require it to repair the viaduct in question, under two distinct contracts. First, it says the city was bound not to call on the railroad company to make these repairs by the viaduct contract. But an inspection of the contract (Rec. 65) fails to disclose any such agreement. Secondly, it says that the city was precluded from making that requirement of the railroad company by the terms of the latter's charter and an ordinance No. 729. On examining the charter and the ordinance, it is seen that there is no such restriction, but on the contrary, the charter (Sec. 103, see *supra*, p. 3) expressly provides that the railroad company shall maintain its bridges.

The record shows nothing as to an invasion of federal rights except the naked averment that they are invaded. According to the law as declared by this court, that is not a sufficient setting up of a federal question. (*City of New Orleans v. New Orleans Water Works Co., supra.*)

For the foregoing reasons it is respectfully submitted that the writ of error herein should be dismissed.

II.

Conceding this case to be within the jurisdiction of this court the judgment of the state court should be affirmed on motion as provided in paragraph 5 rule 6.

Counsel for defendant in error believe that the

law as declared by the decisions of this court necessitates the dismissal of the writ of error herein for want of jurisdiction. But if in the opinion of the court he is mistaken in that belief he respectfully urges that the judgment of the state court be affirmed under rule 6, paragraph 5, of the rules of this court.

If the writ is not to be dismissed, the language of Mr. Chief Justice Fuller in *New York and N. E. Ry. Co. v. Town of Bristol*, 151 U. S. 556, S. C. 14 Sup. Ct. Rep., 440, while speaking of jurisdiction in that case, is directly applicable.

"The principles to be applied in its exercise are "so well settled that further argument is not needed, "and * * * this being so, the jurisdic- "tion may be said, under the circumstances to rest on "so narrow a foundation, as to give color to the "motion to dismiss, and to justify the disposal of the "case on the motion to affirm."

A part of the claims upon the jurisdiction of this court in this cause are frivolous because they have not even a color of foundation, and the remainder are frivolous because similar claims under similar facts have been repeatedly adversely adjudicated.

If it is admitted that all the grounds of jurisdiction set up in its assignment of error herein by the plaintiff in error, were set up at the proper times and in the proper ways in the state courts, they present to this court the following propositions:

(1.) That the viaduct act and the city ordinance No. 3752 carrying it into effect impair the obligation imposed upon the city by the viaduct contract.

(2.) That said act and said ordinance impair the obligation imposed upon the state by the railroad company's charter and city ordinance No. 729.

(3.) That the judgment of the state court deprives the plaintiff in error of property and confers it upon other persons for a private use.

(4.) That such judgment deprives the railroad company of its property without making just compensation therefor.

(5.) That such judgment in effect denies to the railroad company the equal protection of the laws.

(6.) That such judgment deprives the railroad company of its property without due process of law.

There are no contract obligations for the repair of this viaduct by the city.

(1.) *As to the viaduct contract.* The most careful examination of that contract will not disclose any stipulation or agreement in regard to the repairing of the structure. The ingenious contention made below by the railroad company's counsel was that the viaduct when built, became a part of Eleventh street; that the law required the city to keep its streets in safe condition; and that such law entered into the viaduct contract as a part thereof; hence the city by the execution of the contract became bound to keep the viaduct in repair. The obvious answers to that claim are, that the statute law requiring railroad companies to maintain and keep in good repair their bridges over any road or other way (Sec. 103, Chap. 25, Rev. St.

Neb., 1866 (quoted *supra*) and the law requiring the railroad companies not to imperil the public convenience and safety, also entered into the contract; and also that the city fully performs its duty to keep the street safe when it compels the railroad company to keep its crossing safe. Giving the defendant every advantage that could be claimed for its position and treating its sophistry as sound reasoning, the situation would be this: the railroad company understood that the burden of repairing the viaduct when constructed would be cast upon the city, and the city understood that such duty would be upon the railroad company under the general law of the state. In such a state of facts there can be no agreement—no meeting of the minds of the parties—no contract obligation.

(2.) *As to the charter contract and ordinance No. 729.* In what way the charter of the railroad company and ordinance No. 729 imposes upon the city any obligation to repair the Eleventh street viaduct has never been pointed out, even in the arguments of the counsel making the claim. The charter, as has been already noted, expressly provides that "every railroad corporation shall maintain and keep in good order" all its bridges." (Ch. 25, Sec. 103, Rev. St. Neb., 1866). As to the ordinance, (Rec. 70) it merely grants to plaintiff in error the right to construct its line across that street and provides that the tracks shall be constructed so as to conform to the grade of the street as near as may be, and so as to interfere as little as possible with the travel upon the

street. If the point is that permission to make a grade crossing when a track is laid constitutes a contract that the railroad company shall always have the right to retain such crossing, the proposition is so plainly untenable that neither authority nor argument is required to disprove it.

New York & N. E. Co. v. Town of Bristol, 151 U. S., 556, 14 Sup. Ct. Rep. 437 rules the case at bar.

There is not a material contention made by this plaintiff in error that was not made and decided adversely to it in the above case, under facts of such similar import that the law of the one case must be taken as the law of the other. It is true that there was reserved to the Connecticut legislature a power to alter and amend the railroad's charter which is not found in the case at bar. But the decision referred to is made upon a fundamental principle, deeper and broader than that furnished by expressly reserved powers. Says Mr. Chief Justice Fuller:

"It is likewise thoroughly established in this court that the inhibitions of the constitution of the United States upon the impairment of the obligations of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self protection can not be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S., 659; *Barbier v.*

Connelly, 113 U. S., 27, 5 Sup. Ct. 357; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S., 650, 6 Sup. Ct., 252; *Mugler v. Kansas*, 123 U. S., 623, 8 Sup. Ct., 273; *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct., 468."

And again quoting the final paragraph of the opinion:

"The conclusions of this court have been repeatedly announced, to the effect that though railroad corporations are private corporations, as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression; * * * that there is no unjust discrimination, and no denial of the equal protection of the laws, in regulations applicable to all railroad corporations alike; nor is there necessarily such denial, nor an infringement of the obligation of contracts, in the imposition upon them, in particular instances, of the entire expense of the performance of acts required in the public interests, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state that, in such particulars, a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of infraction of the constitution of the United States. *Railway Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct., 28; *Banking Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct., 47; *Railway Co. v Beckwith*, 129 U. S. 26, 9 Sup. Ct., 207; *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct., 231; *Railway Co. v. Gibbes*, 142 U. S. 386, 12 Sup. Ct., 255; *Railroad Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct., 870."

Upon no material ground can the plaintiff in error

differentiate its case from the above mentioned case. It is true the decided case is one of moving a railway crossing and the case at bar relates to a viaduct over such a crossing. But those particulars are incidental and immaterial features of the substantial thing—the protection of the public at railway crossings—which is the fundamental fact in both cases. Nor in this regard is there any distinction to be made between building a viaduct and repairing a viaduct. The reasons which would necessitate construction will necessitate maintenance. The railroad's duty to the public is continuing and not ended by any one act, and the power to compel the building of viaducts is not exhausted when exercised once. If the state can require the railroad to build one viaduct, it can require it to replace it with another when the first is worn out; and on the same grounds it can require it to keep the first one in a condition to serve the purpose of its construction.

Mr. Chief Justice Post in the opinion of the state court herein (Rec. 84) says:

"To summarize briefly, we conclude from the foregoing authorities and many others examined that the legislation assailed in this cause is a *valid* exercise of the police power of the state over the subject to which it applies."

And the last repeatedly announced conclusion of this court enumerated by Mr. Chief Justice Fuller in the quotation above made is:

"That the adjudication of the highest court of a state that, in such particulars, a law enacted in the exercise of the police power of the state *is valid*, will not be reversed by this court, on

the ground of an infraction of the constitution of the United States."

In conclusion, I respectfully urge that the questions here raised are no longer open questions; and that they have been so fully and so frequently considered by this court that no further argument upon them is needed or justifiable. It is submitted that if the court retains jurisdiction herein it should only be exercised to affirm the judgment of the state court.

W. J. CONNELL,

Attorney for the Defendant in Error.

Statement of the Case.

stitution, must determine for itself the existence or the non-existence of the contract set up, and whether its obligation has been impaired by the state law.

The contract between the city of Omaha, the Union Pacific Railway Company, and the Omaha & Southwestern Railroad Company of February 1, 1886, (founded upon the act of Nebraska of March 4, 1885, relating to viaducts, bridges and tunnels in cities,) providing for the building of a viaduct along Eleventh street in Omaha, at the expense of the two railroad companies, was a contract in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged; but it was not a contract whose continuance and operation could not be affected or controlled by subsequent legislation.

When the subject-matter of such a contract is one which affects the safety and welfare of the public, the contract is within the supervising power and control of the legislature, when exercised to protect the public safety, health and morals, and the clause of the Federal Constitution which protects contracts from legislative action cannot, in every case, be successfully invoked.

In view of the paramount duty of a state legislature to secure the safety of the community at an important railroad crossing within a populous city, it was and is within its power to supervise, control and change agreements from time to time entered into between the city and the railroad company as to a viaduct over such crossing, saving any rights previously vested.

It is competent for the legislature of the State to put the burden of the repairs of such a viaduct crossing several railroads upon one of the companies, or to apportion it among all, as it sees fit; and an apportionment may be made through the instrumentality of the City Council.

THE State of Nebraska, on the relation of the city of Omaha, filed its petition in the district court of the fourth judicial district of Nebraska on January 19, 1895, asking judgment for the issuing of a writ of mandamus requiring the Chicago, Burlington and Quincy Railroad Company to repair, in accordance with the directions of a city ordinance enacted under certain statutes of the state legislature, the south one-third of the viaduct at Eleventh street in the city of Omaha, a structure forming a part of that street, and spanning a number of railroad tracks, one of which was owned and used by the said company, the others being owned by the Union Pacific Railway Company and used by it and two other companies. The defendant filed its answer on March 6, 1895, alleging therein, amongst other things, that the legislature of Nebraska had no

power to impose upon the defendant the duty of maintaining or repairing the viaduct, for the reason that to do so would be in violation of the obligations of the contract, hereinafter described, under which the viaduct was constructed, and contrary to the provisions of the Constitution of the United States. At the trial of the case evidence was adduced by both parties, but there was substantially no dispute respecting the facts, the controversy having relation only to the validity, interpretation and effect of legislative enactments and to the validity of city ordinances. On May 1, 1895, the court entered judgment in favor of the city, and directed that a peremptory writ of mandamus issue to the defendant company, commanding and requiring it to make the repairs in question, the same to be commenced immediately and carried forward without unnecessary delay. The defendant, having been denied a new trial, took the case on writ of error to the Supreme Court of the State, and upon the affirmance by that court of the judgment of the said district court, sued out a writ of error bringing the case here, alleging in its assignment of errors that the statutes of Nebraska, which were held by the Supreme Court of that State to be valid, and to require the company to make the said repairs, were repugnant to the Constitution of the United States because they impaired the obligation of contracts, abridged the company's privileges and immunities, deprived it of its property without due process of law, and denied to it the equal protection of the laws, and that the judgment enforcing those statutes was therefore erroneous.

The facts presented are substantially as follows:

The defendant company is a corporation of the State of Illinois, has complied with the laws of the State of Nebraska so as to be authorized to do business as a railroad company in that State, and maintains a general office therein, and is the grantee of and successor to the Burlington and Missouri River Railroad Company in Nebraska, a corporation of the State of Nebraska, which company was the lessee of the Omaha and Southwestern Railroad Company, a corporation organized in the year 1869 under chapter 25, Revised Statutes of Nebraska

of 1866. That chapter contains, among other provisions, the following:

"Sec. 83. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way or ground of any kind, or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities, owning or having charge thereof, and the railroad company, to agree upon the manner, and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary, in the judgment of the directors of such railroad company, to use or occupy such road, street, alley or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the eighty-first section of this chapter. . . . Sec. 86. Any railroad company may construct and carry their railroad across, over or under any road, railroad, canal, stream or watercourse, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct their railroad crossings as not unnecessarily to impede the travel, transportation or navigation upon the road, railroad, canal, stream or watercourse so crossed. . . . Sec. 103. Every railroad corporation shall maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct, for the purpose of enabling their road to pass over or under any turnpike, road, canal, watercourse or other way."

On May 14, 1884, an ordinance of the city of Omaha was approved, granting to the Omaha and Southwestern Railroad Company the right of way through portions of certain streets and alleys, including Eleventh street, in that city. The ordinance was in part as follows:

"Said Omaha and Southwestern Railroad Company shall have the right to construct, maintain and operate a line of railroad along, upon, through and across said portions of said streets and alleys as a part of its line; Provided, that said

railroad track and tracks are constructed so as to conform to the grade of said street as near as may be, and so as to interfere as little as possible with the travel along and upon said streets; and, provided, that nothing herein contained shall be construed as interfering with the right of any property owner to recover from said company any damages resulting to private property by reason of the construction of said railroad, and nothing herein granted shall authorize any interference with the tracks of the Union Pacific Railway Company now laid and operated by said Union Pacific Railway Company in any portions of the streets and alleys herein named and enumerated."

On March 4, 1885, an act of the legislature of Nebraska was approved, entitled "An act to provide for viaducts, bridges and tunnels in certain cases, in cities of the first class;" whereby it was provided that the mayor and city council of any city of the first class should have power, whenever they deemed any such improvement necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct or bridge over or tunnel under any railroad track or tracks, switch or switches, in such cities, when such track or switches crossed or occupied any street, alley or highway thereof, in the manner and extent provided for in the act; and should have the power to pass any and all ordinances, not in conflict with the act, that might be necessary or proper for the construction, maintenance and protection of the said works.

By virtue of this act the city of Omaha, which was then a city of the first class, and the Union Pacific Railway Company and the Omaha and Southwestern Railroad Company, the lessor of the defendant company, executed an agreement in writing February 1, 1886, providing, amongst other things, for the construction of a viaduct on Eleventh street across the tracks of those companies. The agreement was in part as follows:

"That the said parties of the second part, [the Union Pacific Railway Company and the Omaha and Southwestern Railroad Company,] in pursuance of the provisions of an act

of the legislature of the State of Nebraska, entitled 'An act to provide for viaducts, bridges and tunnels in certain cases, in cities of the first class,' do hereby assume and agree to pay as may be required by the mayor and city council of said city three-fifths of the entire cost of constructing a viaduct along Eleventh street and three-fifths of the damages to abutting property on account of the construction of such viaduct not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars, ($90,000) the amount so assumed and agreed to be paid, being three-fifths of the entire cost and damages, to be proportioned between said parties of the second part, as follows: Three-fourths thereof to be paid by said Union Pacific Railway Company and one-fourth thereof to be paid by said Omaha and Southwestern Railroad Company. . . . The plans and specifications for said viaducts before contracts for the construction thereof are entered into, shall be submitted to and approved by said parties of the second part, and should plans and specifications be adopted by said party of the first part, and approved by said party of the second part, which shall increase the said cost and damages beyond the amounts herein limited, then the said parties of the second part are to pay their respective proportions of said increased cost and damages, in the same manner and according to the same division as hereinbefore agreed."

Under the provisions of this agreement the viaduct was built, and in 1887 it was opened to the use of the public. On March 30 of that year, a short time before the viaduct was completed, an act of the legislature was approved, entitled "An act to incorporate metropolitan cities, defining, regulating and prescribing their duties, powers and government." The act, which took effect from its passage, declared that all cities in the State of Nebraska then having a population of 60,000 inhabitants or more according to the state census of 1885, and all cities in the State which should thereafter have a population of 60,000 inhabitants or more, should be considered and known as cities of the metropolitan class, and should be governed by the provisions of the act. Laws of

Nebraska, 1887, c. 10. At that time the city of Omaha, according to the state census of 1885, had a population in excess of the said number, and under the act was incorporated a city of the metropolitan class. Section 48 of this act, as amended by an act approved in 1893, Laws of Nebraska, 1893, c. 3, is as follows:

"SEC. 48. The mayor and council shall have power to require any railroad company or companies owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets and over or under such track or tracks, including the approaches to such viaduct or viaducts, as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. Whenever any such viaduct shall be deemed and declared by ordinance necessary for the safety and protection of the public, the mayor and council shall provide for appraising, assessing and determining the damage, if any, which may be caused to any property by reason of the construction of such viaduct and its approaches.

"The proceedings for such purpose shall be the same as provided herein for the purpose of determining damages to property owners by reason of the grading of a street, and such damages shall be paid by the city, and may be assessed by the city council against property benefited.

"The width, height and strength of any such viaduct, and the approaches thereto, the material therefor, and the manner of the construction thereof, shall be as required by the board of public works, as may be approved by the mayor and council.

"When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the proportion thereof, and the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council.

"It shall be the duty of any railroad company or companies upon being required as herein provided to erect, construct, re-

construct or repair any viaduct, to proceed within the time and in the manner required by the mayor and council, to erect, construct, reconstruct or repair the same, and it shall be a misdemeanor for any railroad company or companies to fail, neglect or refuse to perform such duty, and upon conviction any such company or companies shall be fined one hundred dollars ($100) and each day any such company or companies shall fail, neglect or refuse to perform such duty shall be deemed and held to be a separate and distinct offence, and in addition to the penalty herein provided any such company or companies shall be compelled by mandamus or other appropriate proceeding to erect, construct, reconstruct or repair any viaduct as may be required by ordinance as herein provided. The mayor and council shall also have power whenever any railroad company or companies shall fail, neglect or refuse to erect, construct, reconstruct, or repair any viaduct or viaducts, after having been required so to do as herein provided, to proceed with the erection, construction, reconstruction or repair of such viaduct or viaducts by contract or in such other manner as may be provided by ordinance, and assess the cost of the erection, construction, reconstruction or repair of such viaduct or viaducts against the property of the railroad company or companies required to erect, construct, reconstruct or repair the same, and such cost shall be a valid and subsisting lien against such property, and shall also be a legal indebtedness of said company or companies in favor of such city, and may be enforced and collected by suit in the proper court."

In May, 1890, the Union Pacific Railway Company, which now owns twenty-one tracks crossing Eleventh street beneath the said viaduct, entered into agreements with the Chicago, Rock Island and Pacific Railway Company and the Chicago, Milwaukee and St. Paul Railway Company, by the terms of which agreements it granted to those companies the right to possess and use, in common with itself, its main and passing tracks between certain points, which tracks are among the said twenty-one tracks, for the period of 999 years. Subsequently, in that year, the said companies entered into posses-

sion of the interests granted them, and have since continued to use the said tracks in common with their grantor.

By a concurrent resolution of the city council of Omaha, adopted July 21, 1892, it was provided that the city engineer and the committee on viaducts and railways should examine the roadbed of the said viaduct and report whether or not it was necessary to repave it. Acting under this resolution the committee made an examination, and on the 23d of the following month reported in writing that both the roadway and sidewalk of the viaduct were in a dangerous condition. By authority of the city, the viaduct was closed to general public travel some time in 1892, but continued to be used by a street railway company, whose tracks were laid across it, until the autumn of 1894, since which time the city has not permitted it to be used for any travel.

By an ordinance approved December 12, 1893, the city declared the necessity of repairing the viaduct, and empowered and directed the board of public works to prepare plans and specifications for the repairs. Such plans and specifications were thereafter prepared, and were submitted to the council December 15, 1893, by the board of public works and the city engineer, and on January 30, 1894, the council passed an ordinance, No. 3752, approved February 3, 1894, which is as follows:

"An ordinance approving the plans and specifications submitted by the board of public works for the repairing of the Eleventh street viaduct over the railroad tracks and ordering the repairing of said viaduct to be done.

"Whereas, it has been and hereby is deemed and declared necessary for the safety and protection of the public that the Eleventh street viaduct be repaired as herein required; and

"Whereas, it is right, proper and reasonable that the railroad companies owning or operating railway tracks across said Eleventh street should make said repairs to said viaduct; therefore

"*Be it ordained by the City Council of the City of Omaha:* Section 1. That the plans and specifications submitted by the board of public works of the city of Omaha, December 15,

1893, for the repairs of the Eleventh street viaduct over the railroad tracks, upon and across Eleventh street, from a point near Jackson street to a point near Mason street, in the city of Omaha, as prepared by the city engineer of said city, be and the same are hereby approved and adopted.

"SEC. 2. That the Union Pacific Railway Company be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct from the north end of said viaduct south for a distance of two-thirds of the entire length of said viaduct; and the Chicago, Burlington and Quincy Railroad Company, grantee and successor to the Missouri River Railroad Company in Nebraska and the Omaha and Southwestern Railroad Company, be and is hereby ordered, directed and required to repair that portion of said Eleventh street viaduct commencing at the south end thereof, and extending northward a distance of one-third of the entire length of said viaduct; the said repairs to be made in accordance with said plans and specifications, and to be done under the supervision of the city engineer; the said repairs to be commenced without unnecessary delay and fully completed, as herein required, within ninety days from the passage and approval of this ordinance.

"SEC. 3. That the city clerk be and is hereby directed to furnish to said Union Pacific Railway Company and to said Chicago, Burlington and Quincy Railroad Company, owning or operating railroad tracks upon and across said Eleventh street under said Eleventh street viaduct, a duly certified copy of this ordinance, without unnecessary delay, and that the city engineer is hereby directed to furnish to each of said railroad companies a copy of said plans and specifications, and to superintend the work of making said repairs.

"SEC. 4. That this ordinance shall take effect and be in force from and after its passage."

Certified copies of this ordinance and of the said plans and specifications were furnished to the defendant company, but it refused to make the said repairs, or to take any action with reference to making the same. Wherefore the present proceeding was instituted as aforesaid.

Mr. Charles J. Greene for plaintiff in error. *Mr. Ralph W. Breckenridge* was on his brief.

Mr. W. J. Connell for defendant in error.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

The motion to dismiss the writ of error, on the ground that the rights and immunities of the plaintiff in error under the Constitution of the United States were not set up or claimed in the state courts at the proper time and in the proper way, cannot be allowed.

This subject has been so frequently and so recently discussed by this court that it is unnecessary for us to further consider it at large. It is sufficient to say that this record discloses that the plaintiff in error, in its answer to the writ of mandamus issued out of the district court of Douglas County, State of Nebraska, claimed that by reason of certain provisions of its charter, of general laws of the State, and of ordinances of the city of Omaha, all of which were specifically set forth, a contract was created between the plaintiff in error and said city in respect to the viaduct in question, the obligations whereof would be violated by the proposed enforcement of the subsequent act of 1887, contrary to the provisions of the Constitution of the United States; that the district court held that the laws and ordinances so pleaded did not create a contract between the State and city on the one side and the plaintiff in error on the other; that the plaintiff in error, in its petition in error to the Supreme Court of the State, specifically assigned as error the holding of the trial court that the said laws, charter and ordinances did not constitute a contract within the meaning and protection of the Constitution of the United States, guaranteeing the inviolability of contracts; and that the Supreme Court of the State, in its opinion disposing of the case, states that "the most important subject of inquiry is presented by respondent's contention that the ordinance under which the city proceeded in ordering the repairs

in question contemplates the taking of its property without due process of law within the meaning of the state and Federal constitutions, and also impairs the obligation of the contract under which its track was laid and under which said viaduct was constructed."

We think it is plain, from this recital, that a Federal question was specifically presented in both the trial and Supreme courts of the State.

As the record further discloses that the state Supreme Court overruled the railroad company's contention that it held an existing contract whose obligation would be violated by the enforcement of the provisions of a subsequent law of the State, it becomes the duty of this court to inquire whether there was error in that judgment of the Supreme Court of the State.

We have often had occasion to say that this court, when reviewing the final judgment of a state court upholding a state enactment alleged to be in violation of the contract clause of the Constitution, possesses paramount authority to determine for itself the existence or the non-existence of the contract set up, and whether its obligation has been impaired by the state enactment. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Railroad Co.* v. *Rock*, 4 Wall. 177; *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18; *Mobile & Ohio Railroad* v. *Tennessee*, 153 U. S. 486, 492.

We shall proceed, therefore, to examine whether the statutes and ordinances to which the plaintiff in error points us constituted a contract within the protection of the Constitution of the United States, and whether such contract, if found to exist, has been impaired by the subsequent statute and the proceedings thereunder.

The contract, which the plaintiff in error sets up as constitutionally protected from subsequent legislation, is alleged to be found in the act of March 4, 1885, and the agreement in compliance with the provisions of that act between the city of Omaha, the Union Pacific Railway Company and the Omaha and Southwestern Railroad Company on the first day of February, 1886.

By the provisions of the act the mayor and city council in any city of the first class were authorized, whenever they deemed it necessary for the safety and convenience of the public, to engage and aid in the construction of any viaduct, or bridge over, or tunnel under any railroad track or tracks, switch or switches, in such cities, when such track or switches cross or occupy any street, alley or highway thereof; to adopt and secure plans and specifications therefor, together with the estimated cost of the work, and thereupon, if the railroad company or companies, across whose tracks or switches the work is proposed to be built, will assume three-fifths of all damages to abutting property on account of the construction of said viaduct, bridge or tunnel, and secure to the city the payment of the necessary funds to meet it as the work progresses, in such manner and with such security as the mayor and city council shall require; and when the payment of the further sum of one-fifth of the money required for said improvement is arranged for in manner satisfactory to said mayor and council, either by private donations or by execution of such good and sufficient bonds as will protect said city from the payment of said one-fifth, then the said mayor and council may proceed to contract with the necessary party or parties for the construction of such viaduct, bridge or tunnel, under the supervision of the board of public works of such city, and to provide for the payment of one-fifth of the cost thereof by the city, by special tax on all taxable property in such city, and one-fifth by special tax on property benefited. It was further provided that the city, with the assent of the railroad company or companies aiding in the construction of any such viaduct, bridge or tunnel, may permit any street railway company to build its street railway track and operate its railway upon or through the same, upon such terms and conditions and for such compensation as shall be agreed upon between the city and the street railway company; and that the compensation for such use shall be set apart and used towards the maintenance of such viaduct, bridge or tunnel; and it was further provided that the mayor and council of any such city should have the power to pass any and all ordi-

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY *v.* NEBRASKA, *ex rel.* OMAHA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

No. 178. Argued January 10, 11, 1898. — Decided April 11, 1898.

A Federal question was specifically presented in the trial of this case both in the trial court and at the hearing in error before the Supreme Court of the State, and the motion to dismiss cannot be allowed.

This court, when reviewing the final judgment of a state court, upholding a state law alleged to be in violation of the contract clause of the Con-

nances, not in conflict with the act, that might be necessary or proper for the construction, maintenance and protection of the works provided for.

The agreement made, in pursuance of the said act, between the city of Omaha, as party of the first part, and the Union Pacific Railway Company and the Omaha and Southwestern Railroad Company, as parties of the second part, provided that the parties of the second part assumed and agreed to pay, as should be required by the mayor and city council, three fifths of the entire cost of constructing a viaduct along Eleventh street in said city over the railroad tracks of the said second parties, and three fifths of the damages to abutting property on account of the construction of such viaduct, not otherwise provided for by waivers or private contributions, such entire cost and damages not to exceed the sum of ninety thousand dollars; and that the amount so assumed and agreed to be paid, being three-fifths of the entire cost and damages, was to be apportioned between the railroad companies, so that three fourths thereof should be paid by the Union Pacific Railway Company and one fourth by the Omaha and Southwestern Railroad Company.

Under this agreement the viaduct was built and formally opened to the use of the public early in the year 1887.

By an act approved March 30, 1887, c. 10, Laws of Nebraska, 1887, 105, entitled "An act incorporating metropolitan cities, and defining, regulating and prescribing their duties, powers and government," it was, among other things, provided as follows: "The mayor and council shall have power to require any railroad company or companies, owning or operating any railroad track or tracks upon or across any public street or streets of the city, to erect, construct, reconstruct, complete and keep in repair any viaduct or viaducts upon or along such street or streets, and over or under such track or tracks, including the approaches to such viaduct or viaducts as may be deemed and declared by the mayor and council necessary for the safety and protection of the public. . . . When two or more railroad companies own or operate separate lines of track to be crossed by any such viaduct, the

proportion thereof, and of the approaches thereto, to be constructed by each, or the cost to be borne by each, shall be determined by the mayor and council. After the completion of any such viaduct, any revenue derived therefrom by the crossing thereon of street railway lines, or otherwise, shall constitute a special fund, and shall be applied in making repairs to such viaduct. All ordinary repairs to any such viaduct or to the approaches thereto, shall be paid out of such fund, or shall be borne by the city."

In 1893 another act was passed, c. 3, Laws of Nebraska, 1893, 70, amending the act of 1887, and making it the duty of any railroad company or companies to erect, construct or repair any viaduct in the manner required by the mayor and council, providing a penalty for neglect or refusal to perform such duty, and prescribing a proceeding by mandamus to compel the companies to erect or repair any viaduct as may be required by ordinance, and empowering the city, in case of failure or refusal by the railroad companies, itself to do the necessary work, the cost thereof to be a charge and lien upon the property of the railroad companies, and also to be a legal indebtedness of the companies, collectible by suit in the proper court. On January 30, 1894, the city council passed an ordinance requiring the Union Pacific Railway Company to repair that portion of the said Eleventh street viaduct for a distance of two thirds of the entire length of the viaduct, and the Chicago, Burlington and Quincy Railroad Company, as grantee and successor of the Omaha and Southwestern Railroad Company, to repair the other one third portion of said viaduct, said repairs to be made in accordance with plans furnished by the city and under the supervision of the city engineer, and to be completed within ninety days. And upon the refusal of the companies to comply with said ordinance separate proceedings in mandamus were brought against them.

No doubt the agreement of 1886 constituted a contract, in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted its provisions defined the rights and duties

of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation?

Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject-matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature when exercised to protect the public safety, health and morals, and that clause of the Federal Constitution which protects contracts from legislative action cannot in every case be successfully invoked. The presumption is that when such contracts are entered into it is with the knowledge that parties cannot, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature.

We do not, indeed, understand that these principles are questioned on behalf of the plaintiff in error. What is claimed is that the subject-matter of the contract in question does not fall within the range of the police power of the State. It is argued that "while it may be true that a viaduct over railroad tracks located across a public street may be essential to the public safety, it does not follow that a legislative enactment impairing the obligation of an existing contract is necessary to secure its construction and maintenance, and that any attempt upon behalf of the State to establish a viaduct through such legislation, however necessary the viaduct itself may be to the public safety, would be an invasion of the Federal jurisdiction unless adopted under the compulsion of state necessity; that while it is not questioned that the

maintenance of the viaduct is essential to the safety of the community, yet if existing contract obligations devolve this burden upon the city, the legislature of the State cannot, under the plea of public necessity, pass a law imposing it upon the plaintiff in error, without bringing the act within the prohibitions of the Federal Constitution."

Before considering this proposition it is proper to observe that it proceeds upon the assumption that, by the agreement between the parties in the present case, the duty of repairing and maintaining the viaduct was put upon the city. But an examination of the terms of the contract fails to show that this assumption is well founded. Certainly there is therein no express provision or stipulation that, after the viaduct had been constructed, its future repair and maintenance should be at the cost of the city. It is, however, contended that, as the viaduct when constructed became a part of Eleventh street, and as the law implies a duty on the city to keep its streets in a safe condition, such a duty entered into this contract as a part thereof, and therefore the city by the execution of the contract became bound to keep the viaduct in repair. On the other side, however, it was equally made the duty of the railroad company by the statute of Nebraska under which this agreement was made "to maintain and keep in good repair all bridges, with their abutments, which such corporation shall construct for the purpose of enabling their road to pass over or under any turnpike, road, canal, watercourse or other way."

While, therefore, it is the equal duty of the city and of the railroad company to guard the safety of the public by the erection and maintenance of a proper crossing or viaduct, it does not follow that, in the absence of an express agreement to that effect, such a duty is, by implication of law, devolved upon one party to the relief of the other. Indeed, the contract in question shows that, in consideration of their mutual duty to the public, the parties participated in the expense of the construction of the viaduct; and it would seem to be a reasonable implication that there should be a common obligation to keep it in repair.

However this may be, we think that, in view of the para-

mount duty of the legislature to secure the safety of the community at an important crossing within a populous city, it was and is within its power to supervise, control and change such agreements as may be, from time to time, entered into between the city and the railroad company, in respect to such crossing, saving any rights previously vested. Any other view involves the proposition that it is competent for the city and the railroad company, by entering into an agreement between themselves, to withdraw the subject from the reach of the police power, and to substitute their views of the public necessities for those of the legislature.

This subject has been so often considered by this court that it seems needless to here enlarge upon it. It is sufficient to cite a few of the cases. *Beer Co.* v. *Massachusetts*, 97 U. S. 25; *Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Mugler* v. *Kansas*, 123 U. S. 623.

In *New York & New England Railroad* v. *Bristol*, 151 U. S. 556, the subject was elaborately considered, and it was there held that an act of the State of Connecticut relating to railway crossings, being directed to the extinction of grade crossings as a menace to public safety, was a proper exercise of the police power of the State; that there is no unjust discrimination and no denial of the equal protection of the laws, in regulations regarding railroads, which are applicable to all railroads alike; and that the imposition upon a railroad corporation of the entire expense of a change of grade at a highway crossing is no violation of the Constitution of the United States, if the statute imposing it provides for an ascertainment of the result in a mode suited to the nature of the case. It is true that in that case there was a provision in the charter of the railroad company, reserving a right to the legislature to alter and amend the same; but this court based its reasoning and conclusion entirely upon the police power of the State. The following language of the Supreme Court of Connecticut was quoted with approval: "The act, in scope and purpose, concerns protection of life. Neither in intent nor in fact does it increase or diminish the assets of either the city or of the

railroad companies. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone, or in part by both; and may enforce obedience to its judgment."

Wabash Railroad Company v. *Defiance*, 167 U. S. 88, was a case much like the present one. It was there held, affirming the Supreme Court of Ohio, that the legislative power of a city may control the question of grades and crossings of its streets, and a power to that effect, when duly exercised by ordinances, will override any license or consent previously given, by which the control of a certain street had been surrendered; that such matters cannot, from their public nature, be made the subject of a final and irrevocable contract.

Another ground of complaint is that the act in question delegates to the municipality authority, in cases where two or more railway companies owning or operating tracks across public streets to impose the cost and expense of constructing and maintaining viaducts over the same upon either or any of such companies, and that the city ordinance, in execution of such authority, imposes upon two of the four companies named in the record the entire expense of the repairs in question, and this is said to deny the plaintiff in error the equal protection of the law.

It is true that, by virtue of agreements between the Union Pacific Railway Company and the Chicago, Milwaukee and St. Paul Railroad Company and the Chicago, Rock Island and Pacific Railroad Company, the two latter companies were using certain tracks belonging to the former which were under said viaduct. But it is not easy to see why the

plaintiff in error can complain that the city omitted to bring those companies in as parties. The nature and extent of their rights under the agreements with the Union Pacific Railway Company do not appear, and, for aught that is disclosed in this record, it may have been a feature of those agreements that the Union Pacific should protect them from any charge or exaction of the kind in question.

Again it is said that the apportionment made by the ordinance of the extent of the repairs, one third to the plaintiff in error and two thirds to the Union Pacific Railway Company, was arbitrary, without notice, and contrary to plain principles of justice and equality.

But if, as we have seen, it would have been competent for the legislature to have put the burden of these repairs upon one of the parties, or to have apportioned them among the parties, as it saw fit, so it may make a due apportionment through the instrumentality of the city council. The latter was not directed to proceed judicially, but to exercise a legally delegated discretion.

In *State* v. *Missouri Pacific Railway*, 33 Kansas, 176, the power of the city of Atchison to compel the respondents to construct viaducts was sustained under legislation similar to that herein involved, and referring to the subject of notice, the court, per Judge Valentine, said: "We do not think that it is necessary that the city should have given the railroad companies notice before passing the ordinance requiring them to construct the viaduct. Notice afterward, with an opportunity on the part of the railroad companies to contest the validity of the ordinance and the right of the city to compel them to construct the viaduct, is sufficient."

Health Department v. *Trinity Church*, 145 N. Y. 32, was the case of an action to recover a penalty under a statute requiring all tenement houses to be supplied with water on each floor occupied or intended to be occupied by one or more families, whenever so directed by the board of health. The statute made no provision for notice to property holders, and none in fact was given, while it was admitted that it would cost the respondent a considerable sum of money to comply with the order of the board.

Opinion of the Court.

In the opinion of the court, per Peckham, J., it was said: "The legislature has power and has exercised it in countless instances to enact general laws upon the subject of the public health or safety without providing that the parties who are to be affected by those laws shall first be heard before they shall take effect in a particular case. . . . The fact that the legislature has chosen to delegate a certain portion of its power to the board of health, . . . would not alter the principle, nor would it be necessary to provide that the board should give notice and afford a hearing to the owner before it made such order. . . . Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbance. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure."

So, in the present case, while no notice may have been given to the railroad companies of the pendency of the ordinance, and while they may not have been invited to participate in the proposed legislation, yet they had an opportunity to, and did in fact, put in issue, by the answer, both the validity of the ordinance and the reasonableness of the amount apportioned to them respectively for the repair of the viaduct in question.

The validity of the statute and of the ordinance having been passed upon and upheld by the courts of the State, it is not the function of this court, apart from the provisions of the Federal Constitution supposed to be involved, to declare state enactments void, because they seem doubtful in policy and may inflict hardships in particular instances.

The judgment of the Supreme Court of Nebraska is, accordingly,

Affirmed.

The Chief Justice took no part in the hearing and decision of the case.